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In The

# Supreme Court of the United States

JULIE GRANDSON, ET AL.,

*Petitioners,*

v.

UNIVERSITY OF MINNESOTA, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

What is the proper standard under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, for awarding monetary damages against an educational institution for past discrimination in denying female students equal athletic scholarship and participation opportunities?

## PARTIES TO THE PROCEEDING

Petitioners, Julie Grandson, Jennifer A. Thompson, Renata D. Lindahl, Ginger M. Jeffries, Alexandra L. Wongstrom and Paula Olson, are all individuals with no corporate affiliations. Respondent, University of Minnesota, Duluth ("UMD"), is a public state university. The individual Respondents, Lawrence Ianni, Kathryn Martin, Gregory Fox, Bruce McLeod, Julie Bleyhl, Jean Keffler, Jessica Phillips, Stanley Sahlstrom, William Peterson, Wendell Anderson, Patricia Spence, Warren Larson, Hyron Kim, William Hogan, Thomas Reagan, Nils Hasselmo and H. Bryan Noel, are all employees of UMD or regents of the University of Minnesota System, with no known corporate affiliations.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Julie Grandson, Jennifer A. Thompson, Renata D. Lindahl, Ginger M. Jeffries, Alexandra L. Wongstrom and Paula Olson, respectfully pray that a writ for certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in the above proceedings on November 20, 2001.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 272 F.3d 568 (8th Cir. 2001) and is reprinted in Appendix A, *infra*. The relevant orders of the magistrate judge and the district court, all of which are unpublished, are reprinted in Appendix B, Appendix C and Appendix D, *infra*.

## JURISDICTION

The court of appeals entered its judgment on November 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program

> or activity receiving federal financial assistance. . . .

In the Education Amendments of 1974, Congress directed regulations to be promulgated under Title IX expressly addressing gender discrimination in intercollegiate athletics:

> The Secretary shall prepare and publish, not more than 30 days after August 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, *including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sport.*

(Emphasis added.) In 1975, the Department of Health, Education and Welfare ("HEW"), under the direction of Casper Weinberger, completed Title IX regulations. Regarding financial assistance, those regulations provide that, in providing financial assistance to any of its students, a recipient shall not:

> (1) on the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate.

34 C.F.R. § 106.37. With regard to the provision of equal participation opportunities to male and female student athletes, the regulations provide:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate

> the interests and abilities of members of both sexes. . . .

34 C.F.R. § 106.41(c). The regulations provided that intercollegiate athletic programs were required to bring themselves into compliance within three years. 34 C.F.R. § 106.41(d). The regulations became law on July 21, 1975.

In 1978, HEW issued a Policy Interpretation clarifying its Title IX regulations. The Policy Interpretation set out a three-part test for determining whether a university is complying with Title IX and the regulations by effectively accommodating, in the "selection of sports and levels of competition," the interests and abilities of both sexes:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418 (1979). After notice and extensive comment, the Policy Interpretation was published in final form in 1979.

## STATEMENT OF THE CASE

When Petitioners filed their lawsuits against UMD in 1997, UMD's intercollegiate athletic program had been in knowing and egregious violation of Title IX for almost 20 years. Beginning in the late 1970's, UMD repeatedly acknowledged that its intercollegiate athletic program was not in compliance with Title IX. Despite repeated, numerous demands from students, parents and community groups, and despite a special appropriation from the Minnesota Legislature for the express purpose of bringing UMD's athletic program into compliance with Title IX, UMD failed to take the necessary steps to end discrimination in its athletic program. Instead, UMD adopted a policy of delay and foot dragging until these lawsuits were filed. Petitioners seek compensatory damages for the injuries they sustained as a result of UMD's intentional failure to comply with Title IX.

### I. UMD's History of Intentional Noncompliance with Title IX

For over 20 years UMD has been aware that its intercollegiate athletic program was not in compliance with Title IX with regard to both the provision of participation opportunities and funding, including the funding of scholarships for female athletes. Despite this awareness and despite repeated demands from students, parents, community groups and state government, UMD refused to take the necessary steps to end its acknowledged gender-based discrimination until forced to do so by the filing of these lawsuits.

**1979.** In a March 6, 1979 memorandum, Linda Larson, UMD's Women's Athletic Coordinator, informed UMD's

Provost that the discriminatory funding of women's athletics violated Title IX and that legal action would be taken unless funding improved:

> With the pressures being exerted by the young women in our programs, I feel that it is only fair to inform you that unless funds become available to properly support our programs, legal action will be initiated. *There is no question that we are in violation of Title IX* and it is my opinion that there is sufficient evidence to prove bias in the distribution of funds for women's programs within the University system.

CAP App. 164 (emphasis added).[1] UMD's Provost forwarded the memo to Vice President Stanley Kegler with the added comments that he was also aware of complaints from UMD's female athletes:

> I have been expecting such a memo for some time now. The women in our athletic program have complained to Ralph Romano [UMD's Athletic Director] several times this year about the low level of funding of their programs and have finally decided to appeal to a "higher court."
>
> * * *
>
> I would urge the Central Administration to address the problem now before we are all embarrassed by a law suit.

CAP App. 165.

**1980**. The problem of discriminatory funding was not well-received by UMD's administration. In a May 22, 1980 internal memorandum from UMD's Provost's Office dealing with the funding of women's teams, the subject

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[1] "CAP App." followed by a page number refers to a document contained in the Appendix to Appellants' (Petitioners') Brief filed with the court of appeals.

was described as "UMD's Albatross – Sometimes Called Women's Athletics." CAP App. 166. That same memorandum referred to a new funding package and stated that with regard to threatened Title IX lawsuits "we should be in a reasonable shape, but with no fat," barring a disaster such as a "too successful women's program requiring a lot of national tournament travel." *Id.*

**1981**. The new funding package was still discriminatory. In a letter dated May 11, 1981, addressed to Regent Michael Unger and copied to all relevant UMD officials, the UMD Student Concerns Committee threatened legal action "to bring to an immediate end this second class status of UMD women's athletics." CAP App. 168. On June 10, 1981, the *Duluth Herald* reported threats of a Title IX lawsuit against UMD and quoted Ralph Romano, UMD's Athletic Director, as saying that he was "concerned with funding shortages." CAP App. 169.

**1982-83**. In response to the widespread complaints about funding of its women's athletic program, UMD *eliminated* two women teams, swimming and skiing. CAP App. 170, 346-48. Not surprisingly, complaints about UMD's discriminatory treatment of its women's athletic program continued. In a letter to UMD's Provost dated October 5, 1983, and signed by 300 parents, the former director of UMD's Alumni Association asked that UMD reinstate the swimming program it had just eliminated. CAP App. 171-84.

**1984**. In a letter dated April 16, 1984, the President of the UMD Student Association, wrote to UMD's President complaining about funding for women athletes: "Repeating, it is vital that UMD's Women's Athletics program no longer be forced to suffer the injustice of inadequate funding." CAP App. 185. A 1984 UMD document entitled

"Disparity of Funding for UMD Women's Intercollegiate Athletics" contains the following statement:

> This problem of inequity for UMD women has been existent [sic] for ten years. There have been innumerable promises by the University President and various Vice Presidents that the problem exists and steps would be taken to solve the problem.

CAP App. 186.

**1987-91.** Under increasing pressure to address discriminatory treatment of women's athletics, UMD added a women's golf team in 1987, which was immediately successful. CAP App. 187-89. In 1989, UMD also added women's cross-country skiing. CAP App. 190. Two years later, in 1991, claiming lack of funds, UMD eliminated both the women's cross-country ski team and, despite its success, the women's golf team. CAP App. 191-94, 349-50. Prior to the elimination of these teams during the 1990-91 school year, the female participation rate in intercollegiate athletics at UMD was only 26%. Addendum to Appellants' (Petitioners') Brief filed with the court of appeals at Tab 11. It dropped even lower after the eliminations. *Id.*

**1992.** After the elimination of women's skiing and golf, UMD was even more keenly aware of its noncompliance with Title IX. In April 1992, UMD's Vice President, Greg Fox, sent UMD's Athletic Director, Bruce McLeod, a memo requesting a report on UMD's Title IX compliance "so the Chancellor and I can be prepared to answer any questions which may come up concerning those issues at UMD." CAP App. 195. On May 6, 1992, Eleanor Rynda, the long-standing women's track and cross-country coach, met with Greg Fox to complain

about UMD's discriminatory treatment of women athletes. CAP App. 303.

**1993**. During the next several years, the pressure on UMD to bring its athletic program into compliance with Title IX by expanding participation opportunities and funding increased. In response, UMD continued to delay. UMD acknowledged that its athletic program was discriminatory under Title IX, claimed it was working on it, and then did nothing. In June 1993, UMD produced a "Gender Equity Statement" in which it acknowledged that its intercollegiate athletic program had not attained gender equity and that "[t]o reach this equity amongst the athletic programs at UMD, the total program should be taken into consideration." CAP App. 196. The Statement acknowledged that total female participation in the UMD intercollegiate athletic program was only 31.2% and that the percentage of athletic scholarship dollars going to women was even worse – 22.2%. CAP App. 197. The goals set out in the statement to achieve gender equity are remarkably trivial – a female participation rate of only 35% and a total financial support figure for the women's program of only 26.3%. CAP App. 198.

**1994-95**. On May 15, 1994, the *Duluth News-Tribune*, in an article on Title IX, quoted Bruce McLeod, UMD's Athletic Director, as acknowledging that UMD was not in compliance with Title IX: "It's scary, but I hope the general public would understand that we know we aren't where we should be." CAP App. 207. McLeod added that UMD was "trying real hard" to reach Title IX compliance. *Id.* But there was no indication that UMD was doing anything to achieve Title IX compliance. A year after McLeod's statement, in the 1995-96 academic year, UMD had over twice as many male intercollegiate athletes than

female, 253 male versus 122 female, for a female participation rate of 32.5%. Addendum to Appellants' (Petitioners') Brief filed with the court of appeals at Tab 9, p. 2; CAP App. 209. Women's teams received 18.3% of total operating expenses and only 17.7% of total recruiting expenditures. *Id.* at pp. 4, 5; CAP App. 211-12. Of the $380,392 in athletically-related student aid, $311,069 or 81.8% went to male students and only $69,323 or 18.2% went to female students. *Id.* at 5; CAP App. 212. These figures were worse than those for 1992-93. Indeed, the participation rate for women athletes was better in 1978. Addendum to Appellants' (Petitioners') Brief filed with the court of appeals at Tab 11.

**1996-97**. The next year, 1996-97, while the participation rate improved to 37%, the total number of women athletes was less than it had been in 1978. Addendum to Appellants' (Petitioners') Brief filed with the court of appeals at Tabs 12 and 13. Of the $476,632 in athletically-related student aid awarded to UMD students during the 1996-97 academic year, $402,593 or 84.5% went to male students and only $74,038 or 15.5% went to female students. *Id.* These figures represented an increase from the previous year of $91,524 in student aid awarded to male athletes and an increase of only $4,715 awarded to female athletes. *Compare* Addendum to Appellants' (Petitioners') Brief filed with the court of appeals, Tab 9, p. 5 with CAP App. 218. These figures demonstrate that UMD was making no real progress toward gender equity and Title IX compliance, but in several important areas was actually losing ground. These lawsuits were filed in early 1997.

In September 1996, the United States Department of Education's Office of Civil Rights ("OCR") had filed an

administrative complaint against UMD based on its long-standing violations of Title IX. On April 2, 1997, two months after Petitioner Julie Grandson filed her lawsuit, UMD, while denying any past or present violations of Title IX, entered into an agreement with OCR in which it agreed to increase participation opportunities for women by expanding squad sizes from 122 to 134 in 1996-97, and to 137 in 1997-98, and to ensure that male and female varsity athletes "are provided equivalent opportunities to receive athletic financial assistance." CAP App. 299. UMD also agreed to submit periodic status reports "summarizing its efforts to carry out" the terms of the agreement. CAP App. 301. OCR's investigation did not address UMD's failure to field a women's Division I sports team equivalent to UMD's Division I men's ice hockey team. As a result, in the OCR settlement UMD was not required to elevate women's hockey or any other women's sport to Division I status.[2]

## II. Plaintiffs' Claims

### A. Women's Soccer

UMD added a varsity Division II women's soccer team in 1994. Addendum to Appellants' (Petitioners') Brief filed with the court of appeals, Tab 7, p. 3; CAP App. 143. It recruited talented high school players like Julie Grandson with the promise of adequate funding and

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[2] OCR has no authority to award monetary damages for past violations of Title IX. OCR has also been criticized for inconsistent and ineffective enforcement of Title IX in the area of equal athletic opportunity. *See, e.g.*, Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 Colum. J.L. & Soc. Probs. 331 (1999).

scholarships – and then completely failed to deliver. In the spring of 1995, UMD cut the already impoverished women's soccer budget and women's tennis budget by $500 each. CAP App. 243. This was during the same year that the men's ice hockey program was $128,000 over budget and the men's football program was $75,000 over budget. CAP App. 244, 341. It was also during the same year in which the men's hockey team's budget for hockey sticks was more than the entire budget for women's soccer. CAP App. 207, 246. Grandson played for two seasons with no scholarship and little support from UMD before quitting for lack of money to pay expenses. CAP App. 27.

On August 15, 1996, Grandson advised UMD's Director of Equal Opportunity that she intended to file a lawsuit based on UMD's discriminatory treatment of the women's soccer team. CAP App. 241. In addition to UMD's refusal to fund scholarships for female soccer players, she made the following additional complaints:

> The team did not have balls; they had to buy their own. The team did not have uniforms; they had to use club uniforms. Practice time was not equal – women had to wait for practice until football players completed theirs, and the women had to be quiet when football players were in the weight room. Trainers conveyed the attitude that soccer wasn't a worthwhile sport. Part of Doc Roach's salary is from the State Special, but he spends the majority of his time with the football team. The mode of transportation for the women's soccer team is different – they have to take a bus which frequently breaks down. Female soccer players are assigned to sleep 4 to a room; men's hockey sleeps 2 to a room.

*Id.* On August 19, 1996, Grandson's complaints were forwarded to Greg Fox, UMD's Vice Chancellor for Finance and Operations and acting Athletic Director. *Id.*

Julie Grandson was not the only female soccer player to complain of discriminatory treatment by UMD. Indeed, the entire soccer team presented a list of the same complaints to Linda Larson, UMD's Women's Athletic Coordinator. CAP App. 242.

Receiving no response from UMD to her or her team's complaints after waiting six months, on February 3, 1997, Grandson filed this lawsuit seeking monetary damages under Title IX. Three days later, UMD announced it would begin to provide soccer scholarships, but claimed that it was not in response to Grandson's lawsuit and that soccer scholarships had "always been a part of our plan." CAP App. 247. At his deposition, however, former UMD Athletic Director, Bruce McLeod, stated that to his knowledge UMD had never had a plan to provide soccer scholarships. CAP App. 339.

**B. Women's Ice Hockey**

UMD's strategy of stalling on Title IX compliance is also illustrated by its response to increasing demands that it add women's hockey as a varsity sport. UMD had long maintained a men's Division I ice hockey team, the highest level of competition in intercollegiate athletics. UMD had never fielded a Division I women's team of any sort and supported women's ice hockey only at a club level. UMD was aware that this situation violated Title IX. In April 1993, the University of Minnesota System sent a memo to each campus, including UMD directing that:

> Each campus with a men's varsity level hockey team and a women's club level hockey team shall analyze the campus responsibility for Title IX equity as it applies to this disparity and shall report its plan to ensure equity to the education committees by January 15, 1994.

CAP App. 221. While the University of Minnesota Twin Cities responded to this memorandum by immediately adding a Division I women's ice hockey team, UMD did not, despite numerous requests that it do the same. In 1995, a detailed proposal for adding women's ice hockey was submitted to UMD which demonstrated the necessary interest among students, competition at other schools, etc. CAP App. 222-27. Local newspapers began to support the idea of adding a women's hockey team. In a memorandum dated October 31, 1995, UMD's Athletic Director brought several of these articles and their implications for UMD's Title IX compliance to the attention of UMD's Vice President, Greg Fox. CAP App. 228-30. In a letter dated October 18, 1996, the Women's Resource and Action Center at UMD sent UMD Chancellor Kathryn Martin a letter expressing concerns about Title IX and requesting that the women's club hockey team be elevated to Division I status. CAP App. 232. In a letter dated January 13, 1997, the Duluth Women's Commission urged UMD to elevate women's hockey to a varsity sport. CAP App. 233.

Finally, in a letter dated April 19, 1997, after Julie Grandson had already filed her lawsuit, three female hockey players at UMD, including Petitioner Renata Lindahl, formally requested UMD to elevate the women's club hockey team to a Division I varsity team equal to the men's team. CAP App. 235, 351-52. UMD's response was swift and to the point – "No." The day after Plaintiff

Lindahl, *et al.*, made their request, UMD Chancellor Kathryn Martin publically stated that there would be no Division I women's hockey team at UMD because there was no money for such a team. CAP App. 236. Faced with this flat refusal by UMD, Petitioners Renata Lindahl, Jennifer Thompson and Ginger M. Jeffries filed suit against UMD and the individual Defendants seeking injunctive relief requiring UMD to end gender discrimination in its intercollegiate athletic program by increasing the total number of participation opportunities for women and by adding a Division I women's team equivalent to the men's ice hockey team. CAP App. 37-59. Plaintiffs did not specify which women's team should be elevated to Division I status, but suggested either ice hockey or soccer because of the demonstrated student interest in each of those sports. CAP App. 40. Plaintiffs sought to represent a class consisting of all female students currently enrolled at UMD or who will be enrolled at UMD prior to the conclusion of this lawsuit who desire the opportunity to participate in intercollegiate athletics at the varsity level but have been denied such opportunity by UMD's discriminatory practices and funding of women's athletics which results in inadequate participation opportunities for female students at the varsity level. CAP App. 39-40.

Several months after Plaintiffs filed suit, UMD announced it would field a women's Division I ice hockey team, but not until the 1999-2000 school year and without full scholarships until 2002-03 and full funding until 2003-04. CAP App. 237-40. Both Christine Grant, the Women's Athletic Director at the University of Iowa, and Donna Lopiano, the Director of the Women's Sports

Foundation and former Director of Intercollegiate Athletics for Women at the University of Texas at Austin, submitted detailed affidavits opining, based on their extensive experience with intercollegiate women's athletics, that there were no justifiable reasons for UMD to delay adding a Division I women's ice hockey team until the 1999-2000 academic year. CAP App. 306-37. In 2001, during only its second year of existence, the UMD women's ice hockey team won the Division I national championship. Because of UMD's long years of delay in fielding a Division I women's team, Petitioners and the other female hockey players who were students at UMD when these lawsuits were filed were deprived of the many benefits of playing on a championship team.

## III. The Women's Special Allocation and Proceedings Before the District Court

During the summer of 1997, after these lawsuits were filed, Plaintiffs learned that UMD had been diverting revenues generated by the women's athletic program to subsidize men's athletics. During that same summer, a Minnesota Legislative Audit Report revealed that UMD had, since 1975, received over $8 million in funds appropriated by the Minnesota Legislature for the express purpose of bringing its athletic program into compliance with Title IX and that UMD had misused a portion of that money to subsidize men's athletics. CAP App. 264-98. Because this Court had ruled that educational institutions with actual knowledge of gender discrimination that fail to rectify that discrimination are liable for compensatory damages under Title IX, Plaintiffs Thompson, Lindahl and Jeffries sought leave on July 30, 1997 to amend their pleadings to enlarge the class they proposed to represent

to include current and former students asserting claims for damages caused by UMD's intentional discrimination against women athletes in violation of Title IX. Petitioner Julie Grandson had included a claim for monetary damages in her original complaint.

On July 31, 1997, UMD filed a motion to dismiss both lawsuits, arguing that as a state university the Eleventh Amendment prevented it from being subject to Title IX at all. UMD also argued that Petitioners' claims were mooted by UMD's settlement with OCR and by UMD's announcement that it would field a Division I women's ice hockey team by the 1999-2000 school year. On December 18, 1997 the magistrate judge denied without prejudice Petitioners' motion to amend their complaint to add a claim for damages, ruling that it was premature while UMD's motion to dismiss was pending. CAP App. 93.

On March 16, 1998 the district court denied UMD's motion to dismiss in full. CAP App. 95-114. On April 23, 1998 Petitioners refiled their motion to amend their complaint to add a claim for monetary damages. CAP App. 60-91. Plaintiffs also sought to add two new plaintiffs, Alexandra Wongstrom, a golfer, and Paula Olson, a rugby player. CAP App. 64-65. On July 23, 1998 the magistrate judge denied Petitioners' motion to amend their pleadings. Appendix B, *infra*. The magistrate judge ruled that any amendment seeking compensatory damages would be futile under the standard announced a few weeks before in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989 (1998), because petitioners had not alleged in their amended complaint that they had personally brought UMD's gender discrimination in its athletic program to the attention of any UMD official. App. 18-19. On the same day, the magistrate judge recommended that

Petitioners' class allegations be struck. On August 17, 1998, the district court, without comment or analysis, summarily affirmed the magistrate judge's order denying Petitioners' motion to amend. Appendix C, App. 20. The district court also ordered that Petitioners' class allegations be struck, again without comment.[3] CAP App. 138-40.

On June 23, 1998, UMD filed a motion for summary judgment in both cases. On January 15, 1999 the district court granted both motions. Appendix D, *infra*. The court held that because Petitioners Jennifer Thompson and Ginger Jeffries had exhausted their NCAA eligibility they could not benefit from injunctive relief, the only relief sought due to the court's denial of Petitioners' motion to amend to add claims for monetary damages. Therefore, Petitioners' claims for injunctive relief were moot. App. 29-31. The court noted that Julie Grandson's claim for damages was not moot but granted summary judgment nonetheless. *Id.* The court ruled that because Grandson had failed to allege that she had personally complained to UMD about UMD's unequal treatment of women athletes, under the standard announced in *Gebser* she was not entitled to monetary damages as a matter of law. *Id.* at 7-8.

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[3] Because the district court denied Plaintiffs' motion to amend, Plaintiffs' proposed class of former and current students seeking monetary damages for UMD's past intentional discrimination was not affected by the district court's order striking class allegations. If Petitioners are allowed to amend their complaint, a class action for damages will therefore survive.

### IV. The Decision of the Court of Appeals

The United States Court of Appeals for the Eighth Circuit adopted the district court's determination that the standard for determining an educational institution's liability for a teacher's sexual harassment announced in *Gebser* also applied to cases involving allegations that an academic institution intentionally discriminated on the basis of sex by denying female students equal athletic scholarship and participation opportunities. The court of appeals ruled that Julie Grandson in her original complaint and the remaining Petitioners in their amended complaint, even though both alleged intentional discrimination by UMD, had not specifically alleged that they had themselves complained to a UMD official with authority to address the discrimination and that that official had responded with deliberate indifference, as required in sexual harassment cases under *Gebser*, 272 F.3d at 575-76; App. 10-13. The court concluded that because the allegations in Petitioners' complaints failed to satisfy the standard set out in *Gebser* for awarding monetary damages in sexual harassment cases, Petitioners had failed to state a claim for damages against UMD for discrimination in the provision of equal athletic scholarship and participation opportunities. *Id.*

## REASONS FOR GRANTING THE PETITION

These cases present the Court with an opportunity to provide much needed guidance on an important question of Title IX jurisprudence over which the courts of appeal are badly split: What is the proper standard for determining when an educational institution is subject to monetary damages under Title IX for denying female students

equal athletic opportunities? The Court has granted certiorari in three separate cases to define the contours of an educational institution's liability for monetary damages under Title IX for sexual harassment. However, the Court has never addressed the same issue in the much different but equally important context of an educational institution's failure as a matter of policy to provide equal athletic opportunities to male and female students. As a result, three different courts of appeals have reached three different conclusions regarding the proper standard to be applied under such circumstances.

## I. Title IX and Gender Equity in College and High School Athletics

In an Olympic year which marks the 30th anniversary of Title IX, no one can seriously dispute the enormous impact that this statute has had on the strength of the women's athletic movement in the United States.[4] As the First Circuit stated in its seminal Title IX decision in *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997):

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[4] As set out by the United States Department of Education, prior to the enactment of Title IX scholarships and participation opportunities for female athletes were virtually non-existent. After winning two gold medals at the 1964 Olympics, swimmer Donna de Varona could not find a college willing to offer her a swimming scholarship. Scholarships for female athletes simply did not exist. Dr. Dot Richardsen, captain of the 1996 United States Olympic gold medal softball team, as a youngster was told she could participate in Little League only if she cut her hair and allowed herself to be called "Bob." United States Department of Education, *Title IX: 25 years of Progress*, June 1997.

> One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficial effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports.

*Id.* at 188[5] (citations omitted).

Old habits die hard, however. While much progress has been made, much remains to be done. In a gender equity follow-up study issued in May 1997, shortly after these lawsuits were filed, the National Collegiate Athletic Association ("NCAA") found that while 53% of undergraduates at Division I universities were females, only 37% of the student athletes at these universities were female. Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 Seton Hall J. Sports L. 391, 416-18 (1997). The same study revealed that an average of 77% of athletic operating expenses went to men's athletics at Division I universities. *Id.* Male athletes

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[5] Female athletes attending schools like UMD that failed to bring their athletic programs into compliance with Title IX were, of course, unable to share in this success.

received 62% of all athletic financial aid and an average of 73% of recruiting moneys were spent on male athletes. *Id.* Head coaches of men's teams received an average of 50% more in salary than the head coaches of female teams and assistant coaches for men's teams received an average of 300% higher salaries than assistant coaches of female teams. *Id.* That same year, the United States Department of Education found that nationwide female athletes received only one-third of all athletic scholarship dollars and that only 23% of total athletic operating expenses went to women's athletics. United States Department of Education *Title IX: 25 Years of Progress,* June 1997.

## II. The Importance of Monetary Damages

In *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 112 S. Ct. 1028 (1992), the Court ruled that monetary damages were available under Title IX for gender-based discrimination. Commentators have widely acknowledged the importance of this decision and the resulting availability of monetary damages for past discrimination in the fight for gender equity in college and high school athletics:

> Until Franklin, plaintiffs bringing suit under Title IX could only seek compliance with the law, a remedy that often held little attraction for students who would graduate before any changes were made. Giving plaintiffs access to individual relief made the prospect of a contentious lawsuit more appealing both to plaintiffs and to the lawyers needed to represent them. The threat of having to pay out large damage awards also promised to operate as a powerful incentive for schools to bring their athletic programs, as well as their other educational programs, into compliance with Title IX. Perhaps

> even more importantly, the availability of damages avoided the problem of student-plaintiffs graduating from their respective schools and thereby making their legal claims moot. By including a claim for damages, plaintiffs would still have a justiciable Title IX claim even after graduation. Thus, Franklin represented a major step forward in Title IX enforcement.

Deborah Brake and Elizabeth Catlin, *Setting a Course For College Athletics: The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 Duke J. Gender L. & Policy 51, 60-61 (1996). *See also* Laura J. Kolpin, *Has Title IX Delivered An "Air Ball" to Coaches of Women's Athletics*, 45 Drake L. Rev. 253, 258 (1997); Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. Legal Aspects of Sport 1, 7 (2001).

The instant case provides an excellent example of the importance of monetary damages to Title IX lawsuits involving athletic programs. As a result of the lower court's rulings that Petitioners had no claims for monetary damages, their claims for injunctive relief became moot upon the exhaustion of their NCAA eligibility. Petitioners are left with no remedy for the real damages they suffered in the form of lost scholarships, lost participation opportunities and the lost chance to compete on a par with male athletes.[6] Such a result clearly discourages

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[6] As the First Circuit noted in its first *Cohen* decision, the availability of athletic scholarships and the opportunity to participate in sports are critical to many student athletes: "[F]or many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career

other potential plaintiffs from bringing enforcement actions under Title IX. Just as important, unless Petitioners' claims for monetary damages are reinstated, UMD will suffer no adverse consequences as a result of its long history of intentionally violating Title IX – a result that creates obvious negative policy incentives for UMD and for other educational institutions. Unless monetary damages are available for past violations of Title IX, "the pay now or pay later" incentive for bringing an intercollegiate athletic program into compliance with Title IX before being forced to do so by a lawsuit simply does not exist.

### A. *Gebser, Davis* and the Standard for Awarding Damages Under Title IX in Sexual Harassment Cases

After the Court's 1992 decision in *Franklin v. Gwinnett County Public Schools*, a great deal of confusion developed in lower courts over the standard to be applied in determining when an educational institution is guilty of intentional discrimination and thus subject to monetary damages under Title IX in the context of a claim of sexual harassment by a teacher or by another student. The Court has twice granted certiorari to define the contours of a school's liability under such circumstances.

In the first such case, *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989 (1998), the Court rejected the use of agency or negligence principles to render a school district liable for monetary damages for the sexual harassment of a teacher. The Court ruled that

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and life successes in and out of professional sports." *Cohen v. Brown University*, 991 F.2d 888, 891 (1st Cir. 1993).

actual notice of the harassment and failure to remedy it is necessary for the assessment of monetary damages against the school under Title IX:

> Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

524 U.S. at 290, 118 S. Ct. at 1999.

In the second case, *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999), the Court extended liability under Title IX to instances of student-on-student sexual harassment. Consistent with its decision in *Gebser*, the Court ruled that monetary damages could be assessed against the educational institution only when the institution acted with deliberate indifference to "known" acts of harassment. *Id.* at 639-40, 119 S. Ct. at 1669-70.

### B. A Split in the Circuits Exists Over the Standard for Assessing Monetary Damages in Title IX Cases Involving Discrimination in the Provision of Athletic Opportunities

While granting certiorari in three separate cases involving monetary damages under Title IX for sexual harassment, the Court has never considered a case involving a claim for damages under Title IX for the denial of equal athletic opportunity. As a result, the courts of appeals are split on the proper standard to be supplied in such cases. In the instant cases, the Eighth

Circuit ruled that the actual notice/deliberate indifference standard articulated in *Gebser* and *Davis* for sexual harassment cases is also applicable to cases involving the denial of equal athletic opportunity. In sharp contrast, the Fifth Circuit and Sixth Circuit have ruled that the standard announced in *Gebser* and *Davis* is restricted to sexual harassment cases and has no application to cases involving the denial of equal athletic opportunity. While agreeing on this point, the Fifth and Sixth Circuits disagree on the proper standard in such cases.

In this case, the Eighth Circuit, with no analysis, concluded that the actual notice/deliberate indifferent test set out in *Gebser* applied to Petitioners' claims that UMD knowingly discriminated against women in providing athletic scholarship and participation opportunities:

> In *Gebser*, the Supreme Court noted that the express remedy in Title IX operates on an assumption of prior notice of alleged discrimination to the funding recipient and an opportunity to rectify any violation voluntarily. 524 U.S. at 288, 118 S. Ct. 1989. The Court therefore held that compensatory damages may not be recovered in cases of teacher-student sexual harassment unless a school official with authority to address the discrimination had actual notice of and was deliberately indifferent to the discrimination. *Id.* at 290, 118 S. Ct. 1989. Here, the Thompson Plaintiffs' proposed amended complaint recited at length alleged disparities in the resources and opportunities afforded the women's and men's athletic programs and then asserted in conclusory fashion that UMD has "intentionally violated Title IX by knowingly and deliberately discriminating." There was no allegation of prior notice of their complaints to appropriate UMD officials, no allegation of

> deliberate indifference by such officials, and no allegation they had afforded UMD a reasonable opportunity to rectify the alleged violations. The district court did not abuse its discretion in denying the Thompson Plaintiffs leave to amend to assert damage claims that would have been futile under *Gebser*.

272 F.3d at 575, App. 11.

In *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the Fifth Circuit reached exactly the opposite conclusion, ruling that the *Gebser* standard, designed to determine an educational institution's knowledge of and response to an individual teacher's or student's sexual harassment, makes no sense when applied to allegations of *institutional* discrimination. In *Pederson*, a group of female student athletes brought Title IX claims against Louisiana State University("LSU") very similar to those brought by Petitioners in these cases, including claims for monetary damages for LSU's past discrimination in the provision of equal athletic opportunity. As did UMD, LSU argued that the plaintiffs' complaint failed to satisfy *Gebser's* actual notice/deliberate indifference standard and thus failed to state a claim for monetary damages. *Id.* at 881-82. The Fifth Circuit, unlike the Eighth Circuit, forcefully rejected this argument, holding that the standard for assessing monetary damages set out in *Gebser* and *Davis* has no application to cases involving the denial of equal athletic opportunity:

> [T]he requirement in the sexual harassment cases – that the academic institution have actual knowledge of the sexual harassment – is not applicable for purposes of determining whether an academic institution intentionally discriminated on the basis of sex by denying females

> equal athletic opportunity. In the sexual harassment cases, the issue was whether the school district should be liable for the discriminatory acts of harassment committed by its employees. These cases hold that school districts must themselves have actual discriminatory intent before they will be liable for the discriminatory acts of their employees. In the instant case, it is the institution itself that is discriminating. The proper test is not whether it knew of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity, and, as we noted above, we are convinced that they did.

*Id.* at 882. As in *Pederson*, the evidence in this case at the very least creates a fact issue regarding whether UMD "intended to treat women differently on the basis of their sex by providing them unequal athletic opportunities." *Id.* Thus, under the standard announced by the Fifth Circuit, Petitioners in this case would have been allowed to proceed to trial with their claims for monetary damages under Title IX.

A divided panel of the Sixth Circuit followed the Fifth Circuit and held that the standard for assessing monetary damages in sexual harassment cases has no application to cases involving gender discrimination in athletic programs. In *Horner v. Kentucky High School Athletic Ass'n*, 206 F.3d 685 (6th Cir.), *cert. denied*, 531 U.S. 824 (2000), a group of female athletes sued the Kentucky High School Athletic Association and the Kentucky State Board of Education claiming that the defendants' failure to sanction fast-pitch softball for girls violated the Equal Protection Clause and Title IX. The court characterized the plaintiffs' claims as involving a facially neutral policy

and concluded that an award of Title IX monetary damages under such circumstances required plaintiffs to show an intentional violation of Title IX. *Id.* at 692. The court then followed the Fifth Circuit in rejecting the use of the *Gebser* standard under such circumstances:

> This leaves the question of what standard to apply to determine intent when a facially neutral policy is challenged. Currently, the only clear test in the Supreme Court is that of "deliberate indifference." However, the cases from which that test arose, *Franklin*, *Gebser*, and *Davis*, all address deliberate indifference to sexual harassment, and are not readily analogous to the present situation. *See Pederson v. Louisiana State Univ.*, 201 F.3d 388, 412-13 (5th Cir. 2000). In those cases the school district was sued for its failure to prevent its agents from sexually harassing a student (or engaging in some other form of misconduct). Thus, "intent" in that context means "actual notice" of the abuse by a third party and a failure to stop it.

206 F.3d at 692-93. The court noted the standard adopted by the Fifth Circuit, but because it found no evidence that the defendants had intentionally violated Title IX, it affirmed the district court's dismissal of the plaintiffs' claims for monetary damages without ruling on the Fifth Circuit's standard. *Id.* at 693 n. 4. In dicta, however, the court adopted a "discriminatory animus" test borrowed from Title VI case law. *Id.* at 696. In a detailed dissent, Judge Nathaniel Jones disapproved the "discriminatory animus" test suggested by the majority as overly strict, and instead advocated a variation of *Gebser's* deliberate indifference test modified for athletic opportunity cases. *Id.* at 698-706.

## CONCLUSION

Three courts of appeals have had occasion to address the question of the standard to be applied in determining liability for monetary damages under Title IX for gender-based denial of equal athletic opportunities. The three resulting opinions have produced *four* proposed standards – all different. This question of Title IX jurisprudence, because it potentially affects every university, college and school district in the United States that supports an athletic program, is simply too important to tolerate this level of confusion. In *Gebser*, this Court granted certiorari to end similar lower court confusion over the standard for awarding monetary damages under Title IX in sexual harassment cases. The Court should do the same in this much different, but equally important area of Title IX jurisprudence.

Respectfully submitted,

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## APPENDIX A

**Julie GRANDSON, Plaintiff-Appellant,**

**Jennifer A. Thompson; Renata D. Lindahl; Ginger M. Jeffries, individually and on behalf of all other similarly sitauted [sic], Plaintiffs-Appellants,**

**v.**

**UNIVERSITY OF MINNESOTA, et al., Defendants-Appellees.**

**No. 99-1817.**

United States Court of Appeals, Eighth Circuit.

Submitted: April 12, 2001.
Filed: Nov. 20, 2001

Diane M. Henson, Austin, TX, argued (Larry Meuwissen and Paul Kieffer, St. Louis Park, MN, LaNelle McNamara, Waco, TX, on the brief), for appellant.

Lorie S. Gildea, Minneapolis, MN, argued, for appellee.

Before WOLLMAN, Chief Judge, McMILLIAN and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

These are two actions against the University of Minnesota, its Board of Regents, and current and former administrators of the University's Duluth campus ("UMD") under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"). Plaintiffs seek injunctive and damage relief for UMD's alleged unequal treatment of female student athletes. They appeal the

district court's[1] orders striking the class action allegations in the second suit for failure to file a timely motion for class certification; denying those plaintiffs leave to amend their complaint to assert claims for money damages; and granting summary judgment dismissing all the individual plaintiffs' claims.[2] We conclude the district court did not abuse its discretion in striking the class action allegations. We agree with the district court that the individual plaintiffs lack standing to seek injunctive relief, and that their damage claims do not satisfy the rigorous standards of *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). Accordingly, we affirm.

## I. Background.

*A. Title IX.* Patterned after Title VI of the Civil Rights Act of 1964, Title IX prohibits gender discrimination in education programs receiving federal financial assistance, including athletic programs. Section 901 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Section 902

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[1] The HONORABLE PAUL A. MAGNUSON, then Chief Judge of the United States District Court for the District of Minnesota.

[2] This case was originally scheduled for oral argument in October 1999 but was deferred pending our en banc decision in *Jim C. v. Ark. Dept. of Educ.*, 235 F.3d 1079 (8th Cir.2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 2591, 150 L.Ed.2d 750 (2001). *Jim C.* precludes the University's Eleventh Amendment defense. *See* 235 F.3d at 1081 n. 2.

authorizes federal funding agencies to promulgate regulations providing for the termination of federal funding of any noncomplying program or activity, "*Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. § 1682. Pursuant to this authority, the Department of Education has promulgated regulations addressing equal opportunity issues in the provision of athletic scholarships and programs. *See* 34 C.F.R. §§ 106.37(c), 106.41.

Though Congress was silent on the question of private remedies, the Supreme Court has implied a private right of action to enforce Title IX, *Cannon v. Univ. of Chicago,* 441 U.S. 677, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and has authorized the award of money damages, *Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 76, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). However, in fashioning specific implied remedies, the Court recently cautioned, courts must "shape a sensible remedial scheme that best comports with the statute." *Gebser,* 524 U.S. at 284, 118 S.Ct. 1989. In *Gebser,* the Court held that a school district is not liable for a teacher's sexual harassment unless it had actual notice of, and was deliberately indifferent to, the discrimination. The Court explained, 524 U.S. at 288-90, 118 S.Ct. 1989:

> Title IX's express means of enforcement – by administrative agencies – operates on an assumption of actual notice to officials of the funding recipient. . . .

* * *

> It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice. . . . Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have an implied enforcement scheme that allows imposition of greater liability without comparable conditions.

*B. The Administrative Complaint Against UMD.* UMD receives federal funding and therefore must comply with Title IX. In September 1996, before these lawsuits were filed, the Office for Civil Rights of the United States Department of Education ("OCR") notified UMD that a Title IX complaint had been filed alleging that UMD and its athletic department were violating Title IX by:

- not effectively accommodating the athletic interests and abilities of females;
- failing to provide female athletes with proportional athletic financial assistance; and
- failing to provide female athletes with equal opportunities for travel allowances, coaching, practice facilities, medical and training services, housing and dining, publicity services, and recruiting resources.

On April 2, 1997, UMD and OCR entered into an Agreement to resolve the September 1996 complaint. The

Agreement required UMD to increase the squad size of its varsity teams for women, to provide women "equivalent opportunities to receive athletic financial assistance," and to provide women equivalent access to the other services and facilities enumerated in the complaint. The Agreement further required UMD to submit status reports to OCR on October 1, 1997, 1998, and 1999, and a final report on October 1, 2000, "documenting its full implementation of this Agreement." In November 2000, after UMD submitted those reports, OCR determined that UMD had fully implemented all provisions of the Agreement. OCR then terminated its administrative monitoring.

*C. These Actions Commence.* In February 1997, UMD student Julie Grandson filed the first action, seeking injunctive relief and compensatory damages for the scholarship and financial support she allegedly would have received as a member of the women's varsity soccer team had UMD not discriminated against female athletes. Three months later, Jennifer Thompson, Renata Lindahl, and Ginger M. Jeffries (collectively referred to as "Thompson Plaintiffs") filed the second action. The Thompson Plaintiffs purported to sue on behalf of a class of similarly situated female students. They sought injunctive relief requiring UMD to end gender discrimination in its intercollegiate athletic program by increasing the total number of participation opportunities for women and by adding an NCAA Division I women's team.

At the time these actions were filed, UMD fielded seven varsity athletic teams for men and seven for women. All the varsity teams competed at the NCAA Division II level, except for men's ice hockey which was a

Division I team. In 1999, as part of its Title IX compliance efforts under the OCR Agreement, UMD added a Division I women's ice hockey team. Earlier this year, that team won the first NCAA National Championship for women's ice hockey. *See* "UMD Earns NCAA Title," MPLS. STAR TRIB., Mar. 26, 2001, at C1.

***D. Procedural History.*** On June 30, 1997, the Thompson Plaintiffs sought leave to amend their complaint to assert claims for money damages. The district court deferred that motion pending resolution of UMD's motion to dismiss, which was denied on March 16, 1998. Shortly thereafter, the court entered a revised scheduling order, as requested by plaintiffs, which set July 21, 1998, as the deadline for filing dispositive motions. UMD moved to strike the Thompson Plaintiffs' class allegations because the motion for class certification – a dispositive motion under the district court's local rules – had not been timely filed.

Following a hearing on July 23, Magistrate Judge Jonathan Lebedoff recommended that the district court grant UMD's motion to strike the class allegations. The district court adopted this recommendation. Judge Lebedoff also denied the Thompson Plaintiffs' motion to add money damage claims as futile. The district court affirmed this order. Finally, on February 2, 1999, the district court granted summary judgment dismissing the individual plaintiffs' remaining claims. The court ruled that the four plaintiffs lacked standing to seek injunctive relief because they had not played a varsity sport or had exhausted their NCAA eligibility. The court dismissed Grandson's damage claim under *Gebser* because she did not allege that she complained to UMD officials about her

alleged unequal treatment and did not support her allegation of disparate funding with "proof of intentional discrimination or deliberate disregard for women's athletics."

Describing these actions as suits "to end twenty years of pervasive and intentional gender discrimination in the intercollegiate athletic program" at UMD, plaintiffs appeal district court rulings striking their class allegations, denying their motion to add class-wide damage claims, and dismissing the individual claims for injunctive relief and damages.

## II. Discussion.

Plaintiffs complain of widespread intentional discrimination in the funding of women's varsity sports, in the allocation of athletic scholarships to men and women athletes, and in the spending of an annual Women's Special Allocation appropriated by the Minnesota Legislature. Though plaintiffs do not disclose the specific relief they seek, it is apparent they envision injunctive relief that would have the district court function as a *de facto* super-athletic department director, plus sweeping class-wide damage relief for all UMD women students who might have benefitted from a more generous funding of women's athletics.

There have been a number of reported Title IX cases challenging women's collegiate athletic programs, but to our knowledge this is the first case in which (i) a class action was brought after the relevant federal funding agency lodged a broad overlapping complaint against the university, (ii) plaintiffs seek class-wide injunctive relief

over and above a university compliance program that the relevant funding agency has found to be fully adequate, and (iii) plaintiffs seek class-wide damages for alleged programmatic deficiencies that were voluntarily remedied when brought to the university's attention by the funding agency's complaint. Mindful of the Supreme Court's admonition that we must "shape a sensible remedial scheme that best comports with the statute," we doubt that such sweeping claims would ever be sustained in these circumstances.[3] But the most sweeping claims need not be addressed if the district court was correct in striking the Thompson Plaintiffs' class allegations and in denying the individual plaintiffs standing to seek injunctive relief. So we begin with those issues.

*A. Striking the Class Allegations.* The district court struck the Thompson Plaintiffs' class allegations because they failed to file a motion for class certification prior to the deadline for dispositive motions. We review that ruling for abuse of discretion, recognizing "[t]he district court had the power to establish reasonable times for the filing of documents and if those deadlines were not met, the court had the discretion to dismiss all or part of the

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[3] In the Clean Water Act, Congress provided for administrative remedies and expressly authorized private citizen suits that supplement but do not supplant agency enforcement. *See* 33 U.S.C. §§ 1319(g), 1365(b). We construed these remedial provisions to mean that an informal administrative enforcement agreement precludes a citizen suit for inconsistent civil penalties. *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 356-57 (8th Cir.1998). We read *Gebser* as requiring that an implied private action for systemic Title IX relief must likewise take a back seat to an agency proceeding that has led to satisfactory voluntary compliance.

suit." *Burkhalter v. Montgomery Ward & Co.*, 676 F.2d 291, 294 (8th Cir.1982).

A class certification motion shall be brought "[a]s soon as practicable after the commencement of an action brought as a class action." Fed.R.Civ.P. 23(c)(1). A motion for class certification is a dispositive motion under District of Minnesota Local Rule 7.1(b). Here, the dispositive motions deadline was July 21, 1998, fifteen months after the Thompson Plaintiffs filed their initial complaint. On July 9, 1998, they assured the court they would file a motion to extend the dispositive motions deadline "[w]ithin a few days and well before July 21." They did not do so. The Thompson Plaintiffs explain that they were waiting for a ruling on their motion to add claims for money damages. But the legitimacy of that excuse was an issue for the district court. The court struck the class action allegations after concluding that the Thompson Plaintiffs had "no credible excuse for neither seeking class certification before the deadline . . . nor seeking an extension of time" to do so. That ruling was well within its discretion. *See Hall v. Bio-Med. App., Inc.*, 671 F.2d 300, 302-03 (8th Cir.1982) (no abuse of discretion to strike class allegations for plaintiffs' failure to comply with local rule requiring class certification motion within ninety days after case is filed).

***B. The Claims for Injunctive Relief.*** The district court held that each of the four individual plaintiffs lacked standing to seek prospective injunctive relief – Grandson, Thompson, and Jeffries because they have no remaining NCAA eligibility, and Lindahl because she did not play on a varsity team, seeks to compel UMD to create a women's varsity ice hockey team, which it has already

done, and has not attended UMD since 1998. Plaintiffs challenge this ruling as to Grandson but fail to address her lack of standing. That a plaintiff lacks eligibility or is no longer a student is an adequate basis to dismiss an individual Title IX claim for injunctive relief. *See Cook v. Colgate Univ.*, 992 F.2d 17, 20 (2d Cir.1993). Plaintiffs argue that Lindahl's claims are not moot because she left UMD for financial reasons and may return, and because UMD may drop or fail to fund its new Division I women's ice hockey team. These arguments are wholly speculative, particularly given UMD's compliance efforts at the behest of OCR. Thus, Lindahl's individual claim for injunctive relief is moot. *See McFarlin v. Newport Spec. Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir.1992) ("Through the passage of time and the occurrence of irrevocable events, disputes may disappear so that federal courts no longer can grant effective relief.").

*C. The Claims for Damage Relief.* The district court denied the Thompson Plaintiffs leave to amend to add Title IX damage claims, concluding they had failed to state a cognizable claim for damages under *Gebser*. The court subsequently dismissed Grandson's claim for money damages because she failed to allege that she complained to UMD about unequal treatment before suing, as *Gebser* requires, and because "a funding disparity between men's and women's teams by itself is insufficient to support [Title IX] unequal treatment claims." Plaintiffs appeal both rulings.

**1. The Thompson Plaintiffs.** We review the district court's denial of leave to amend a complaint for abuse of discretion. *Fuller v. Sec'y of Def.*, 30 F.3d 86, 88 (8th Cir.), *cert. denied*, 513 U.S. 1019, 115 S.Ct. 583, 130 L.Ed.2d 497

(1994). Leave to amend will be denied if the proposed amended pleading would be futile. *Wald v. Southwestern Bell Corp. Customcare Med. Plan,* 83 F.3d 1002, 1005 (8th Cir.1996).

In *Gebser,* the Supreme Court noted that the express remedy in Title IX operates on an assumption of prior notice of alleged discrimination to the funding recipient and an opportunity to rectify any violation voluntarily. 524 U.S. at 288, 118 S.Ct. 1989. The Court therefore held that compensatory damages may not be recovered in cases of teacher-student sexual harassment unless a school official with authority to address the discrimination had actual notice of and was deliberately indifferent to the discrimination. *Id.* at 290, 118 S.Ct. 1989. Here, the Thompson Plaintiffs' proposed amended complaint recited at length alleged disparities in the resources and opportunities afforded the women's and men's athletic programs, and then asserted in conclusory fashion that UMD has "intentionally violated Title IX by knowingly and deliberately discriminating." There was no allegation of prior notice of their complaints to appropriate UMD officials, no allegation of deliberate indifference by such officials, and no allegation they had afforded UMD a reasonable opportunity to rectify the alleged violations. The district court did not abuse its discretion in denying the Thompson Plaintiffs leave to amend to assert damage claims that would have been futile under *Gebser.*

**2. Grandson.** Grandson seeks money damages for scholarship and other financial support she allegedly would have received as a member of the UMD varsity women's soccer team if UMD had not discriminated against its women student athletes. The district court

concluded that her damage claim fails under *Gebser* because she failed to allege that she complained to UMD about this alleged discrimination, and because Title IX does not prohibit unequal expenditures on men's and women's athletics.

On appeal, Grandson first argues that *Gebser* 's actual notice requirement is satisfied in her case by the numerous complaints UMD has received over the years since Title IX's enactment about the level of funding for women's athletics and the lack of women's varsity teams in sports such as swimming, ice hockey, and cross-country skiing. We disagree. A vigorous public debate on these issues does not demonstrate that UMD knew of systemic non-compliance. For example, OCR's 1979 Policy Interpretation stated that a university's compliance will be tested by whether men and women students are provided substantially proportionate opportunities, *or* whether the university can show "a history and continuing practice of program expansion" for an underrepresented gender, *or* whether it can show that members of an underrepresented gender "have been fully and effectively accommodated by the present program." 44 Fed.Reg. 71,413, 71,418 (1979), applied in *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir.1996), *cert. denied*, 520 U.S. 1186, 117 S.Ct. 1469, 137 L.Ed.2d 682 (1997). These are flexible standards, and *Gebser* emphasized that money damages should not be awarded except for knowing violations. When an individual plaintiff such as Grandson claims money damages from a specific Title IX violation, such as failing to award her a soccer scholarship, *Gebser* requires prior notice to a university official with authority to address the complaint

and a response demonstrating deliberate indifference to the alleged violation.

Grandson next argues that she did complain to the Director of UMD's Office of Equal Opportunity on August 15, 1996. However, this was after she had quit the women's varsity soccer team. It was not evidence [sic] that she complained of monetary injury in timely fashion or that the responsible UMD officials were deliberately indifferent to her claim.

Grandson further argues that UMD's consistently unequal expenditures for its men's and women's athletic teams is sufficient evidence of the deliberate indifference required by *Gebser*. Again, we disagree. Title IX does not require parity of expenditures. *See* 34 C.F.R. § 106.41(c) ("[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute noncompliance"). Likewise, OCR's Policy Interpretation stated "that purely financial measures . . . do not in themselves offer conclusive documentation of discrimination." 44 Fed.Reg. at 71,414.

Grandson further argues that the disproportionately low athletic scholarships awarded to women is evidence of deliberate indifference. The Title IX regulations require that funding recipients "provide reasonable opportunities for [athletic scholarship] awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics," 34 C.F.R. 106.37(c). But OCR construes this regulation as permitting recipients to phase in scholarships for newly created varsity teams. *See* 44 Fed.Reg. at 71,415. UMD started its

women's varsity soccer team in 1994, the first of the two seasons Grandson was on the team.

On this record, UMD's response to the OCR Title IX complaint that preceded Grandson's lawsuit, and the efforts UMD made in fulfilling its commitments under the compliance Agreement with OCR, preclude a finding that UMD has been deliberately indifferent to its overall compliance obligations under Title IX. As Grandson did not give UMD officials prior notice of and an opportunity to rectify the specific violations that she alleges injured her as a member of the women's varsity soccer team, the district court properly granted summary judgment dismissing her claim for money damages.

The judgment of the district court is affirmed.

**APPENDIX B**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JENNIFER A. THOMPSON, RENATA D. LINDAHL, and GINGER M. JEFFRIES, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

UNIVERSITY OF MINNESOTA; UNIVERSITY OF MINNESOTA, Duluth Branch; UNIVERSITY OF MINNESOTA BOARD OF REGENTS, a body politic and corporate; LAWRENCE IANNI; KATHRYN MARTIN; GREGORY FOX; BRUCE MCLEOD; JULIE BLEYHL; JEAN KEFFLER; JESSICA PHILLIPS; STANLEY SAHLSTROM; WILLIAM PETERSON; WENDELL ANDERSON; PATRICIA SPENCE; WARREN LARSON; HYONKIM; WILLIAM HOGAN; THOMAS REAGAN; NILS HASSELMO; and H. BRYAN NOEL,

Defendants.

Civil File No. 97-1072 (PAM/JGL)

**ORDER**

APPEARANCES

(Filed Jul. 23, 1998)

LaNelle McNamara, Esq., and Steven C. Samborski, Esq., on behalf of Plaintiffs.

Lori S. Gildea, Esq. and Mark Bohnhorst, Esq., on behalf of Defendants.

---

JONATHAN LEBEDOFF, United States Magistrate Judge

The above-entitled matter came on for hearing before the undersigned Magistrate Judge of District Court on May 28, 1998, on Plaintiffs' motion to amend the Complaint to add claims for compensatory and punitive damages. The case has been referred to the undersigned for resolution of pretrial matters pursuant to 28 U.S.C. § 636 and Local Rule 72.1.

## I. Applicable Legal Standards

Plaintiffs seek leave to file their Proposed Amended Complaint. Federal Rule of Civil Procedure 15(a) provides that this Court may allow amendments to pleadings and that such amendments "shall be freely given when justice so requires." The presumption is that leave to amend is granted. *See Fuller v. Secretary of Defense*, 30 F.3d 86, 88 (8th Cir. 1994). As the Eighth Circuit held, "[l]eave to amend shall be granted absent a good reason for the denial, such as undue delay, bad faith, undue prejudice to the nonmoving party, or futility." *Id.* (citing *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989)).

With respect to futility, the Eighth Circuit has stated that a party's motion to amend should be dismissed on the merits only if it asserts clearly frivolous claims or defenses; the likelihood of success on the new claim is no basis for denying an amendment unless the claim asserted clearly is frivolous. *See Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244, 1255-56 (8th Cir. 1994) (citing *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 695 (8th Cir. 1981).

Neither delay nor dilatory motive are sufficient in themselves to deny a party leave to amend a pleading. For leave to amend to be denied, the delay or dilatory motive must result in prejudice to the party opposing the motion. *See Buder*, 644 F.2d at 694; and 6 Charles A. Wright, *et al.*, *Federal Practice & Procedure: Civil 2d* § 1487, at 613-14 (1990) (stating that if the court is persuaded that no prejudice will accrue, the amendment should be allowed). Even if *some* prejudice would result to the adverse party if the motion to amend were granted, that prejudice still must be balanced against the hardship to the moving party if it is denied. *See Buder*, 644 F.2d at 694. The burden of proof of prejudice is on the party opposing amendment. *See Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987) (citing *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977)).

## II. Discussion

In the present case, Plaintiffs seek to amend their Complaint to add claims for compensatory and punitive damages and to add Plaintiffs. For the reasons stated below, it would be futile to allow Plaintiffs to amend their

Complaint. Accordingly, Plaintiffs' motion to amend their Complaint will be denied.

In their Proposed Amended Complaint, Plaintiffs seek "a money judgment against UMD for compensatory and punitive damages." (Proposed Amended Complaint ¶ 99(d).) In no other portion of the Proposed Amended Complaint do Plaintiffs specify any party against whom damages are sought. Plaintiffs have failed to state a claim for damages under any of their theories of law. First, under 42 U.S.C. § 1983, Plaintiffs cannot seek damages against the University of Minnesota-Duluth Branch (UMD) because "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dep't of Police*, 491 U.S. 58, 71 (1989). Likewise, Plaintiffs cannot seek damages under section 1983 against the individual Defendants because absent an allegation that Defendants are sued in their individual capacities, it is presumed Defendants are sued in [sic] solely in their official capacities. *See Backlund v. Duluth*, 176 F.R.D. 316, 319 n.1 (D. Minn. 1997) (citations omitted). As previously stated, Defendants acting in their official capacities are not persons for the purposes of section 1983. *See Will*, 491 U.S. at 71.

Similarly, Plaintiffs fail in their Proposed Amended Complaint to state a claim for compensatory damages under Title IX. To maintain a damages claim under Title IX, Plaintiffs must show that allegedly unlawful behavior was brought to the attention of a school official who had the authority to institute corrective measures and that the official was deliberately indifferent to the claimed unlawful behavior. *See Gebser v. Lago Vista Indep. Pub. Sch.*, 118

S. Ct. 1989, 1999 (1998). Plaintiffs have not alleged, however, in their Proposed Amended Complaint that they complained of the allegedly discriminatory practices to any UMD official nor that any UMD official acted with deliberate indifference to any Plaintiff's complaint.

Finally, Plaintiffs provide no factual or legal support for their attempt to add a claim for punitive damages. This Court finds no support fur such a claim.

Based upon all the files, records, and proceedings, herein, **IT IS HEREBY ORDERED** that Plaintiffs' motion to amend the Complaint (Docket No. 33) is **DENIED**.

Dated: July 23, 1998

/s/ Jonathan Lebedoff
JONATHAN LEBEDOFF
United States Magistrate
Judge

**APPENDIX C**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jennifer A. Thompson, Renata D. Lindahl, and Ginger M. Jeffries, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

University of Minnesota, et al.,

Defendants.

Civil File No. 97-1072 (PAM/JGL)

**ORDER**

(Filed Aug. 17, 1998)

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This matter is before the Court upon Plaintiffs' appeal from United States Magistrate Judge Jonathan Lebedoff's Order dated 23, 1998, which denied Plaintiffs' motion to amend the Complaint.

Pursuant to statute, the Court has conducted a *de novo* review of the record. 28 U.S.C. § 636(b)(1); Local Rule 72.1(c). The Court must modify or set aside any portion of the Magistrate Judge's Order found to be clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Local Rule 72.1(b)(2). Based on review of the record and the submissions of the parties, the Court concludes that the Magistrate Judge's Order is neither clearly erroneous nor contrary to law.

Accordingly, **IT IS HEREBY ORDERED** THAT:

Magistrate Judge Lebedoff's Order (Clerk Doc. No. 62) is AFFIRMED.

Dated: August 17, 1998

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court
Judge

## APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Julie Grandson,

Plaintiff,

v.

University of Minnesota, et al.,

Defendants,

and

Jennifer A. Thompson, Renata D. Lindahl, and Ginger M. Jeffries, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

University of Minnesota, et al.,

Defendants.

Civ. File No. 97-265 (PAM/JGL)

**MEMORANDUM AND ORDER**

Civ. File No. 97-1072 (PAM/JGL)

(Filed Feb. 01, 1999)

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This matter is before the Court upon Defendants' Motion for Summary Judgment. Because of the close factual and legal similarities between these two cases, they were briefed and argued together. For the reasons discussed below, the Court grants Defendants' motion.

## BACKGROUND

These cases arise under Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX").

Plaintiffs in these cases claim that the University of Minnesota-Duluth ("UMD") violated Title IX by failing to provide its female students with the opportunity to play varsity women's soccer and ice hockey and by funding its men's and women's varsity teams at different levels.

UMD is a public, four-year branch of the University of Minnesota located in Duluth. Because UMD receives federal funding, it must comply with Title IX. Congress passed Title IX in 1972 to eliminate gender-based discrimination in education. Although the statute did not explicitly address athletics, Congress made clear two years later through the Javits Amendment that Title IX was intended to cover disparities between athletic opportunities for men and women. *See* 20 U.S.C. § 1681; Crista D. Leahy, *The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics*, 24 J.C. & U.L. 489, 494 (1998). In essence, Title IX and its regulations requires that institutions which receive federal funding for any purpose must provide equal opportunities for participation in men's and women's sports, as well as equal treatment for male and female athletes on varsity athletic teams.[1]

UMD notes that over the last ten years, varsity athletic opportunities for women have grown 68%. Currently, UMD fields seven varsity athletic teams for men and seven for women, including women's soccer. UMD began its women's soccer team in 1994. Although it was immediately given varsity status, everyone understood that

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[1] Because of the particular circumstances of this case, it will not be necessary to detail the specific requirements of Title IX.

financial support would be increased gradually, such that the women's team would not be on par with other varsity programs until several seasons had passed. This phase-in, according to UMD, is on-going. As a result, scholarship money and operational funding is not yet to the level where UMD intends it to eventually be. *See* Cane Aff. at ¶5. Additionally, women's ice hockey – now a club sport – was elevated to varsity status for the 1999 season. This move was undertaken upon petition from female students at UMD, and shaped in large part according to the students' desires. The university has already hired a high-profile coach[2] and has begun planning for the first season of varsity Division I competition.

Three of the Plaintiffs in these cases were associated with the women's soccer team. Plaintiff Julie Grandson played on the team in 1994 and 1995. Following the 1995 season, she quit the team. *See* Grandson Dep. at 161. Plaintiff Jennifer Thompson was a member of the team from 1994 to 1997. She dropped out of school after the fall quarter of her fourth year. *See* Thompson Dep. at 50. The third soccer Plaintiff, Ginger Jeffries, played on the women's soccer team during the 1994, 1995, 1996, and 1997 seasons. *See* Jeffries Dep. at 14.

The fourth Plaintiff, Renata Lindahl, asserts a right to play varsity women's ice hockey at UMD. Lindahl appears to be a relative late-comer to the sport, however: her first season of organized hockey did not occur until 1995, when she played for UMD's club team. She did not

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[2] Shannon Miller, the former coach of the Canadian Olympic Women's Ice Hockey Team.

play hockey in high school, and no college recruited her to play on an ice hockey team. *See* Lindahl Dep. at 76. Lindahl's tenure on the club team lasted only two years.[3]

Grandson, Thompson, Lindahl and Jeffries seek injunctive relief which would require UMD to provide comparable funding for its male and female varsity athletic teams and to afford female students the right to play varsity women's soccer and ice hockey. Grandson also seeks monetary damages for the previous Title IX violations she alleges.

These cases had the potential to grow far beyond their present scope. Although the Thompson Complaint is styled a "class action," the Court struck Plaintiffs' class allegations in August. *See Thompson v. University of Minnesota*, Civ. No. 97-1072 (D. Minn. August 17, 1998), at 2. As a result, this case need not involve a far-reaching inquiry into every aspect of UMD's athletic program, as has been the case in a few notorious Title IX cases in recent years. *See, e.g., Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996). Instead, only the claims and issues relating to the specific named Plaintiffs are at issue.[4]

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[3] Lindahl was also a member of UMD's track team, but does not raise any allegation about her treatment in that capacity.

[4] Additionally, the Court has previously denied an attempt by Plaintiffs to amend their Complaints to add two other Plaintiffs and, in the *Thompson* case, to add a request for monetary damages. The briefs filed in this matter were submitted before the Court ruled on those motions. To err on the side of caution, the memoranda submitted thus dealt with issues which the Court's denial of the motions rendered irrelevant.

## STANDARD

Summary judgment is appropriate if there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1987); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). The Court determines materiality from the law governing the claim. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Disputes over facts which might affect the outcome of the lawsuit according to applicable substantive law are material. *See id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *See id.*

## DISCUSSION

### A. Unequal Treatment.

Plaintiffs claim that UMD violates Title IX by providing different levels of financial support for its male and female athletes. (*See* Pl's' Mem. at 12.) Specifically, Plaintiffs allege that UMD provides its varsity women's soccer team and club ice hockey team with a lower level of operational funding and a smaller amount of scholarship money than it gives the varsity men's teams.

Federal courts which have addressed this issue have determined that a claim that a university treats male athletes differently than female athletes "presupposes that the claimant is a varsity athlete who is treated unequally based on her sex." *Pederson v. Louisiana State University*, 912 F. Supp. 892, 904 (M.D.La.1996); *Boucher v.*

*Syracuse University*, No. 95-CV-620, 1996 WL 328444 (N.D.N.Y. June 12, 1996), at *3. Without such status, a plaintiff will ordinarily lack standing to bring a claim for unequal treatment under Title IX.

Plaintiff standing is an essential element of this Court's subject matter jurisdiction under Article III. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). In order for a plaintiff to have standing to maintain a suit, three elements must be present. First, the plaintiff must have suffered an "injury in fact." An "injury in fact" is one which is both "concrete and particularized" and "actual or imminent." Absent such an injury, the Court runs the risk – especially where injunctive relief is sought – of allowing a plaintiff with an insufficient interest in the litigation she brings to determine the rights of truly injured parties. Second, there must be a causal nexus between the defendant's conduct and the injury the plaintiff alleges. Finally, the plaintiff must demonstrate that it is likely – not just hypothetically possible – that the relief sought will remedy the injury of which the plaintiff complains. *See United States v. Hays*, 515 U.S. 737, 742-43 (1995).

Plaintiff Lindahl is unable to maintain her unequal treatment claims because she has never played on a varsity sports team at UMD. Because she has not played a varsity sport, her claim alleging unequal treatment fails the first prong of the test for standing. Lindahl never suffered from any alleged disparity in funding between men's and women's varsity sports. In other words, she never suffered an "injury in fact." *See Pederson* at 904. Any injury she describes goes to the discrepancy between

the women's club ice hockey program and varsity men's teams – a complaint that is properly addressed under a theory of ineffective accommodation.

Plaintiffs Thompson and Jeffries lack standing to raise equal treatment claims as well, although for different reasons. These women played no the varsity women's soccer team. As a result, they could have suffered an injury, if the disparity they complain of amounts to a violation of Title IX. However, each Plaintiff has exhausted her NCAA eligibility. (*See* Def's' Mem. at 20.) Because the sole relief Plaintiffs seek is injunctive, they can no longer benefit from any such relief the Court could enter. *See Cook v. Colgate University*, 992 F.2d 17, 19 (2nd Cir. 1993) (holding that once eligibility is exhausted, plaintiff has no standing to seek injunctive relief for Title IX violation). In addition, Thompson is no longer even a student at UMD, which further weakens the claim for prospective relief she brings.

Plaintiff Grandson's equal treatment claim would fail for the same reason as Thompson's and Jeffries', were it not for the fact that she has asked for damages to remedy previous violations as well in her Complaint. Grandson undeniably has standing to seek damages for prior violations of Title IX. As a result, the Court now examines the merits of Grandson's claim.

Last Term, in *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998), the Supreme Court ruled that a plaintiff who wishes to recover damages for a violation of Title IX must demonstrate that she complained to an institution's supervising officials before she can recover damages for

discrimination. *See id.* at 1995. This is similar to the requirement the Supreme Court recently imposed on discrimination claims under Title VII. *See Burlington Industries v. Ellerth,* 118 S.Ct. 2257 (1998); *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998). Although *Gebser* arose in the context of a suit against a school district for allowing a teacher to harass a student, the Supreme Court did not limit its language to that specific situation. This Court has previously ruled that *Gebser* would require such notification in Title IX cases like this one as well. *See Grandson v. University of Minnesota,* Civ. No. 97-275 (D. Minn. July 23, 1998), at 3. Grandson has failed to allege that she complained to UMD officials about what she saw as unequal treatment between men's and women's varsity athletic teams. As a result, she cannot prevail on her claim for damages.

Even if *Gebser* were limited to sexual harassment cases, though, Grandson's claim would still fail. She apparently relies solely on the fact that the women's soccer team receives less university funding than some men's varsity teams to support her charge. However, nothing in either Title IX or the regulations associated with the statute mandates that a university spend equal amounts of money on male and female athletic teams. 34 C.F.R. § 106.41(c) makes this quite explicit, stating "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute non-compliance with this section."[5] As a result, a funding disparity between men's

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[5] Although that section concludes by noting that the Ass't Secretary of Education may consider such a disparity, along

and women's teams by itself is insufficient to support an unequal treatment claim. Grandson has not coupled this allegation about disparate funding with any other evidence which would support an unequal treatment claim, such as proof of intentional discrimination or deliberate disregard for women's athletics. As a result, her unequal treatment claim would fail on this ground as well.

**B. Effective Accommodation.**

All Plaintiffs claim that UMD has failed to "effectively accommodate" the athletic interests of its female students by refusing to field varsity athletic programs in sports for which women have demonstrated an interest, specifically women's soccer and ice hockey. This requirement stems from 34 C.F.R. § 106.41(c), which declares "[a school which receives federal funding] which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." Furthermore, the Department of Education has issued Regulations and Policy Interpretations which govern the standards by which a school's efforts to accommodate athletes of both genders will be judged. *See, e.g.*, 44 Fed. Reg. 71,418 ("Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test").[6]

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with other evidence, as indicative of a failure to provide equal athletic opportunity to both genders.

[6] The three-prong test establishes that an institution will be deemed Title-IX compliant if (1) opportunities for athletic participation are substantially proportionate to enrollment, (2) the institution has a history and continuing practice of

The Court notes that the effective accommodation claims at bar are unusual, because UMD already fields women's varsity soccer team, and has undertaken thorough student-initiated planning to upgrade the women's ice hockey team to varsity status next season. This distinguishes these cases from the reported cases in which other federal courts have addressed this issue. In the typical case, a plaintiff complains either that a university has failed to create a varsity sports team despite student interest and opportunities for athletes of the other gender, or has removed varsity status from an athletic program. *See, e.g., Cohen,* 101 F.3d at 160 (demotion of women's gymnastics and volleyball teams to club status), *Boucher,* 1996 WL at *1 (absence of women's field hockey team). Plaintiffs did not cite to any case in which collegiate athletes cited a sport which already had varsity status as the basis for an effective accommodation claim. The Court has not found one, either.

This complete lack of case law is telling. Not only would it often simply make no sense for a plaintiff to bring an effective accommodation claim when she already participated on a varsity athletic team, but in most cases the plaintiff would lack standing to do so. Effective accommodation claims speak not to a disparity in resources between men's and women's teams, but rather to the very existence of the teams themselves. Any

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expanding opportunities for the under-represented gender, and (3) the athletic interests and abilities of the students are effectively accommodated. *See* Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 Creighton L. Rev. 1107, 1111 (1998).

injunctive relief a court could enter would primarily consist of an order compelling the defendant to create a varsity sports program to remedy an imbalance in opportunities between the genders. *See Cohen,* 101 F.3d at 187. When a plaintiff is already a member of a varsity sports team, she cannot benefit from such relief, because she has suffered no injury. As a result, the first and third prongs of the standing test – that the plaintiff suffered an alleged injury which could be addressed by the relief sought – are not met. *See Hays,* 515 U.S. at 743. This is the case here for Grandson, Thompson, and Jeffries. Perhaps realizing this, Plaintiffs appear to have conceded that the interests of female soccer players have been effectively accommodated; they do not mention this issue in their Memorandum opposing summary judgment. In addition, Thompson and Jeffries, who have exhausted their athletic eligibility, lack standing to seek injunctive relief for an alleged failure by UMD to accommodate their interests simply because they can never enjoy any injunctive relief the Court might grant.

Lindahl's position is similar. She asks the Court to order UMD to create a varsity women's hockey team. However, as discussed above, UMD has already begun building such a program. Varsity status for the women's ice hockey team is imminent. Nothing this Court could do to address Lindahl's effective accommodation claim would alter what will already transpire next year.[7] Lindahl's case probably satisfies the "actual injury" prong of

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[7] The program Lindahl envisions and the program UMD will actually create could differ, of course. But to the extent that Lindahl has a complaint about how the UMD ice hockey team will be funded, this claim is addressable only under an unequal

the standing test, but fails on the third prong because the relief she seeks is no different than what will happen without the Court's intervention. As a result, Lindahl lacks standing to bring an effective accommodation claim as well.

## CONCLUSION

This is an unusual Title IX case, if only because Plaintiffs claim that UMD fails to accommodate their athletic interests in two sports for which varsity athletic programs are already established or will imminently be created. Because UMD already fields a [sic] varsity women's teams in soccer and ice hockey, Plaintiffs cannot benefit from the relief they seek and thus have no standing to bring effective accommodation claims. Plaintiffs also lack standing to request injunctive relief to remedy alleged unequal treatment of male and female varsity athletes. Finally, Grandson's request for damages must fail under the rule established in *Gebser*.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment in Civ. File No. 97-265 (Clerk Doc. No. 43) is GRANTED;

2. Defendants' Motion for Summary Judgment in Civ. File No. 97-1072 (Clerk Doc. No. 67) is GRANTED;

3. Plaintiff's Complaint in Civ. File No. 97-265 (Clerk Doc. No. 1) is DISMISSED WITH PREJUDICE; and

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treatment theory. However, as noted above, Lindahl could not raise such a claim until she is actually a "varsity athlete."

4. Plaintiff's Complaint in Civ. File No. 97-1072 (Clerk Doc. No. 1) is DISMISSED WITH PREJUDICE.

Dated: January 15, 1999

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court
Judge

Supreme Court, U.S.
FILED
APR 1 2002

No. 01-1261

IN THE

# Supreme Court of the United States

JULIE GRANDSON, *et al.*,

*Petitioners,*

v.

UNIVERSITY OF MINNESOTA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the United States Court of Appeals for the Eighth Circuit correctly apply precedent from this Court when it held that Petitioners were not entitled to a trial on claims for money damages?

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2 Norman J. Singer, *Statutory Construction* § 33.06 (5th ed. 1992) ..... 3

Respondents respectfully request that this Court deny the Petition for a writ of certiorari seeking review of the United States Court of Appeals for the Eighth Circuit's decision in *Grandson v. University of Minnesota*, 272 F.3d 568 (8th Cir. 2001), Pet. App. at 1-14.[1] These two actions raise allegations about the way in which the University of Minnesota operates its athletics program on its campus in Duluth ("UMD").[2] The trial court, Chief Judge Paul Magnuson of the United States District Court for the District of Minnesota, heard the cases together. Finding no genuine issue of material fact, Judge Magnuson granted the University's Motion for Summary Judgment in both cases. *See* Memorandum and Order, filed February 1, 1999, Pet. App. at 22-34. The Court of Appeals affirmed. *Grandson*, 272 F.3d at 576, Pet. App. at 14. The Court of Appeals correctly analyzed and followed precedent from this Court when it affirmed the District Court's award of summary judgment in favor of the University. This case does not present an issue warranting this Court's review.

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1. Petitioners sued the University of Minnesota, its Board of Regents and current and former University employees and members of the Board of Regents. The individual defendants were joined in their official capacity. This brief is submitted on behalf of all named Respondents, who are collectively referred to as "the University."

2. Julie Grandson filed the first case seeking injunctive relief and damages. *See* Complaint, CAP App. at 26-36. Jennifer Thompson, Ginger Jeffrey and Renata Lindal filed the second case seeking only injunctive relief (this action is referred to as the *Thompson* case). *See* Complaint, CAP App. at 37-59. The *Thompson* Plaintiffs later moved to amend their complaint to insert additional plaintiffs and to add claims for money damages. The trial court denied this motion. *See Order*, filed August 17, 1998, Pet. App. at 20-21. The trial court also struck the *Thompson* Plaintiffs' class action allegations. *See* Memorandum and Order, Pet. App. at 25. Petitioners have not sought review of the decision on the class action issue or of the rulings below on injunctive relief issues.

## STATEMENT OF THE CASE

Petitioners' "Statement of the Case" disagrees with and ignores findings made by the District Court and the Court of Appeals and grossly mischaracterizes the facts in the record.[3] Consistent with Sup. Ct. R. 15.2, the University will correct the misimpression left by Petitioners in their Statement of the Case.

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3. For example, Petitioners argue that the evidence shows "UMD's History of Intentional Noncompliance With Title IX." Pet. at 4 and 23. To the contrary, both the District Court and the Court of Appeals found that there was not evidence in the record supporting a finding that UMD had intentionally discriminated against the Petitioners. *See* Memorandum and Order, Pet. App. at 30 ("Grandson has not coupled this allegation about disparate funding with any other evidence which would support an unequal treatment claim, such as proof of intentional discrimination or deliberate disregard for women's athletics."); *Grandson*, 272 F.3d at 575, Pet. App. at 12 ("A vigorous public debate on these issues does not demonstrate that UMD knew of systematic non-compliance."). This finding was the basis for the summary judgment awarded to the University, and Petitioners simply ignore it in the Petition. Elsewhere in their brief, Petitioners rely upon a report from the Office of Legislative Auditor ("OLA") and contend that it found that "UMD had misused" legislatively appropriated funds. Pet. at 15. A review of the document at issue disproves Petitioners' rhetoric. The OLA did not find that UMD discriminated against women, or that UMD had misappropriated money. The OLA noted that "[c]ost allocation is not a precise science" and it took issue with some of the accounting practices UMD followed in 1994-96. OLA report at 7, CAP App. at 275. However, the OLA noted that UMD had changed those practices: "We found that UMD has been responsive to the internal audit and investigative reports. It has taken steps to improve its cost allocation and budgetary practices for the women's athletic program." *Id.* at 8. The OLA made additional recommendations, and UMD acknowledged that it already had addressed these issues. *See* Letter from University in response to OLA report, CAP App. at 291-95.

## Athletics At UMD

During the 1999-2000 academic year, UMD offered fifteen varsity sports: seven for men (baseball, basketball, cross-country, football, ice hockey, tennis, and track and field) and eight for women (basketball, cross-country, ice hockey, soccer, softball, tennis, track and field, and volleyball). With the exception of ice hockey, all of UMD's varsity sports compete at the Division II level within the National Collegiate Athletic Association ("NCAA"), and participate in the Northern Sun Intercollegiate Conference. Ice hockey receives more financial support than any of the other sports offered at UMD, because it is a Division I sport. *Grandson*, 272 F.3d at 572, Pet. App. At 5-6.

## Women's Athletics At UMD Since 1988[4]

The participation opportunities for female student-athletes at UMD have grown tremendously since 1988. *See* Squad Lists, Resp. CAP App. at 18;[5] *see also* Memorandum

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4. Courts have held that the Restoration Act, 20 U.S.C. § 1687 (1988), was passed to make Title IX applicable to athletic programs. *See Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993). Accordingly, 1988, the year the Restoration Act became effective, is a logical point to begin the analysis here. The Restoration Act does not specify an effective date, so the normal rule that the statute takes effect on the date of its passage applies. *See, e.g., United States v. York*, 830 F.2d 885, 892 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988) (citations omitted). The Restoration Act was vetoed by the President, and this veto overridden on March 22, 1988, 134 Cong. Rec. D 295 (daily ed. March 22, 1988), making March 22, 1988 the effective date of the Act. 2 Norman J. Singer, *Sutherland Statutory Construction* § 33.06, at 12-14 (5th ed. 1992).

5. "Resp. CAP App." refers to the Appendix filed with the University's Brief in the Court of Appeals.

and Order, Pet. App. at 23. The resources devoted to women's sports have increased as well. In 1988, the amount of money devoted to specific women's sports through payroll and operating expenses was $152,308. For 1998-99, the sport-specific expenditures on women's sports more than tripled. *See* Affidavit of Susan M. MacDonald, Resp. CAP App. at 183.

UMD also has changed its athletics program in response to assessments of student interests and abilities since 1988. *See* Student Surveys, Resp. CAP App. at 50. Two varsity sports were dropped in 1991,[6] and two women's varsity sports were added: soccer began varsity competition in 1994 and financial support for it has grown every year,[7] and women's ice hockey began Division I play in 1999. *See* Memorandum and Order, Pet. App. at 23-24.

With respect to women's ice hockey, Petitioners claim that UMD should have added this sport earlier. Pet. at 12-15. The evidence does not leave room for this argument. The evidence shows that UMD students wrote to the administration in April 1997 about women's ice hockey.

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6. Men's and women's golf and men's and women's skiing were dropped in 1991, prior to Petitioners' attendance at UMD. The evidence confirms that these sports were dropped for legitimate, nondiscriminatory reasons. *See* University's Answers to Interrogatories, Resp. CAP App. at 156 (listing reasons for decision to drop teams).

7. Petitioners argue that "UMD cut the already impoverished women's soccer budget" in 1995. Pet. at 11. That the soccer budget may have been reduced is irrelevant. The undisputed fact is that the amount actually expended on soccer, as opposed to what was budgeted, grew every year of the program's existence, consistent with the plan to phase-in this sport. *See* Cane Affidavit and MacDonald Affidavit, Resp. CAP App. at 55 and 187-188; *see also* Memorandum and Order, Pet. App. at 23-24 (acknowledging phase-in of soccer).

Contrary to Petitioners' suggestion, Pet. at 13, UMD did not reject the proposal out of hand. Rather, administrators began meeting with students, and the students presented a proposal for adding women's ice hockey as a varsity sport in the summer of 1997. The students' proposal requested that UMD phase-in women's ice hockey as a new varsity sport over a two-year period, and this is exactly what UMD did. *See* Lindal Deposition at 112, 126, 136, Resp. CAP App. at 66-68; Fox Deposition at 170-171, Resp. CAP App. at 162-163. UMD hired Shannon Miller, coach of the 1998 Canadian Olympic women's ice hockey team, to be the head coach of its women's ice hockey program, and after only two years of competition, Coach Miller lead her team to the NCAA National Championship in 2001. *Grandson*, 272 F.3d at 572, Pet. App. at 6 (recognizing National Championship). UMD also won the NCAA National Championship this year.

**The Office For Civil Rights Process**

Prior to the commencement of these cases, UMD received notification that a complaint had been filed with the United States Department of Education, Office for Civil Rights ("OCR"), raising issues regarding the operation of UMD's athletics program. *See* August 28, 1996 letter from OCR, Resp. CAP App. at 70.[8] On April 1, 1997, UMD entered into an agreement with OCR to resolve all of the issues raised in the complaint. *Grandson*, 272 F.3d at 572, Pet. App. at 4-5. On November 1, 2000, OCR, the agency Congress charged with enforcing Title IX, closed its file on UMD and issued a letter indicating that UMD had met its obligations. *Id.*

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8. Petitioners incorrectly assert that the government filed this complaint. Pet. at 6-7. The notification letter from OCR disproves Petitioners' assertion.

**The Petitioners**

The four Petitioners in these cases are former students at UMD. Three of the Petitioners were soccer players at UMD. Julie Grandson was on the soccer team in 1994 and 1995. She quit the team after two seasons, and she has since graduated. *See* Memorandum and Order, Pet. App. at 24.[9] Jennifer Thompson was on the team for four years: 1994, 1995, 1996 and 1997. Having exhausted her eligibility to participate in collegiate soccer, Thompson quit school at UMD following the fall quarter of her fourth year. *See id.* Ginger Jeffrey played on the soccer team for four years, in 1995, 1996, 1997, and 1998, and she also exhausted her eligibility. *See id.* Jeffrey received athletic scholarship aid in the amount of $3,000 for the 1997-98 academic year. *See* Jeffrey Deposition at 39-40, attached as Exhibit 1 to Supplemental Gildea Affidavit, submitted with Defendants' Reply Memorandum in Further Support of Their Motion for Summary Judgment.

The final Petitioner, Renata Lindal, claimed to want to play Division I women's ice hockey at UMD. As the District Court recognized however, Lindal was a "relative late-comer to the sport," Pet. App. at 24, not beginning to play organized hockey until she was a first-year student at UMD in 1995.[10]

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9. Petitioners argue that Grandson complained of "discriminatory treatment" to UMD. Pet. at 11. The memorandum at issue was written after Grandson had quit the soccer team and after she had already decided to sue the University. *See* CAP at 241. Accordingly, as the Court of Appeals properly concluded, this memorandum did not entitle Petitioner Grandson to a trial on her claim for money damages. *Grandson*, 272 F.3d at 576, Pet. App. at 13.

10. Lindal was on UMD's track team for one academic quarter, and she admitted that male and female track athletes were treated equally based upon what she observed. Lindal Deposition at 72-74, Resp. CAP App. at 57-58.

When UMD added women's ice hockey, Lindal did not even try out for the team and she has quit school. *See* Miller Affidavit and Carlson Affidavit submitted in support of University's Suggestion of Partial Mootness.[11]

## REASONS FOR DENYING THE WRIT

Petitioners argue that this Court needs to review the Court of Appeals decision to resolve a split among the United States Circuit Courts of Appeals over the correct standard for awarding money damages to plaintiffs in Title IX athletics cases. Pet. at 24-29. There is no such split requiring this Court's review and even if there were such a split in the circuits, this case is not an appropriate case to resolve it.

### 1. There Is No Conflict Among The Circuits That Requires This Court's Review.

While this Court has never held that plaintiffs can recover money damages in the context of a Title IX athletics case,

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11. In their description of the parties, Petitioners list two additional individuals whom they sought to add as plaintiffs to their case, Paula Olson and Alexandra Wongstrom. The Court does not have jurisdiction to hear issues relating to these individuals. Petitioners' Motion to Amend the Complaint to add these individuals as plaintiffs was denied by the Magistrate Judge, and Petitioners did not appeal this portion of the Magistrate's ruling to the District Judge. *See* Plaintiffs' Objections to Magistrate's Report, Resp. CAP App. at 1. Since they did not appeal this ruling to the District Judge, Petitioners cannot now seek review of issues relating to proposed Plaintiffs Olson and Wongstrom. *See, e.g., Continental Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 251 (3d Cir. 1998); *Pagano v. Frank*, 983 F.2d 343, 345-46 (1st Cir. 1993). *See also* Fed. R. Civ. P. 72(a) ("Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.").

this Court has held that money damages are available for intentional sexual harassment discrimination under Title IX. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74-75 (1992). Petitioners relied upon the standard in *Franklin* in seeking to amend their Complaint in the *Thompson* action to include claims for money damages. *See* Plaintiffs' Memorandum Brief in Support of Motion to Amend Complaint, dated April 21, 1998, at 6 (citing *Franklin*). In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this Court identified one way that plaintiffs could satisfy the intentional discrimination standard established in *Franklin*. This Court held in *Gebser* that plaintiffs could pursue damages claims for violation of Title IX if they showed that the alleged unlawful behavior was brought to the attention of the defendant, through notice to an appropriate official, and that the defendant was deliberately indifferent to the claimed unlawful behavior. *Id.* at 290.

Petitioners contend that the Fifth, Sixth and Eighth Circuits now have different standards of proof on the question of money damages for Title IX athletics cases. *See* Pet. at 24-29. There is not a circuit split that requires resolution from this Court. If money damages are available in a Title IX athletics case, the intentional discrimination standard of *Franklin* must at a minimum be met.[12]

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12. If plaintiffs in athletics cases could recover money damages under Title IX for something less than intentional discrimination, serious constitutional problems would be presented. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (recognizing that disparate impact regulations were not enforceable through private right of action and declining to address arguments that "implied causes of action against states are inconsistent with clear statement rule"); *Guardian Assn. v. Civil Serv. Cmm'n of New York City*, 463 U.S. 582, 598, 607 n.27 (1983) (noting that majority of justices agree that money damages were not available under Title VI absent intentional discrimination).

Petitioners contend that the *Gebser* test for proving intentional discrimination is the law in the Eighth Circuit and that the Fifth and Sixth Circuits are to the contrary. Petitioners miscast the opinions. The cases are all in agreement that evidence of intentional discrimination is the standard. As the Sixth Circuit noted, the methods of meeting that standard may vary depending on the facts of each case. *Horner v. Kentucky High School Athletic Ass'n.*, 206 F.3d 685, 693 (6th Cir.), *cert. denied*, 531 U.S. 824 (2000) ("We can envision various scenarios in which the discriminatory animus and deliberate indifference tests might help establish 'intent' under Title IX"). The Sixth Circuit declined to adopt a specific methodology in *Horner* because it found that the plaintiffs there had not proven a violation of Title IX. *Id.*[13]

The Fifth Circuit applied a discriminatory animus test in finding that the plaintiffs in that case had sufficient evidence of intentional discrimination to proceed to trial on their claims for money damages. *Pederson v. Louisiana State University*, 213 F.3d 858, 879-882 (5th Cir. 2000). The Court of Appeals there found that the *Gebser* test while "arguably met," was not applicable to the facts of that case. *Id.*

By contrast, in this case, the Eighth Circuit found that the *Gebser* test was appropriately applied to the facts of this case. This finding is consistent with *Gebser*. As this Court noted in *Gebser*, there is no private right of action expressed in Title IX. Rather, the cause of action for individuals is judicially implied. 524 U.S. at 283-284. Accordingly, the judiciary has "a measure of latitude to shape a sensible

13. The District Court reached a similar conclusion in this case. *See* Memorandum and Order, Pet. App. at 29 ("Even if *Gebser* were limited to sexual harassment cases, though, Grandson's claims would still fail.").

remedial scheme that best comports with the statute." *Id.* at 284. Congress' "express means of enforcement" for Title IX is the agency process. *Id.* at 288. "Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions." *Id.* at 290. In this case, the Court of Appeals recognized that UMD had gone through Congress' chosen process and successfully satisfied the agency. *Grandson*, 272 F.3d at 572 and 576, Pet. App. at 4-5 and 14. Under these factual circumstances (assuming money damages were even available as a remedy), the Court of Appeals found that the *Gebser* test was the appropriate method for satisfying *Franklin's* intentional discrimination standard.[14] As both the District Court and Court of Appeals found, Petitioners did not meet this test.

### 2. This Case Does Not Present An Opportunity To Resolve Any Conflict.

If this Court finds that the Eighth and Fifth Circuits are in conflict, this Court should still not review this case because Petitioners do not meet either standard. As one of the cases Petitioners cites notes, the *Gebser* test is a less rigorous test for proving intentional discrimination than the discriminatory animus test. *Horner*, 206 F.3d at 693 n.4 (noting that "[t[he discriminatory animus test" is "stricter" than

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14. In contrast, the institution in *Pederson* did not get the same favorable findings from the agency. *Pederson*, 213 F.2d at 880 (noting that OCR's "findings confirmed [athletics director's] ignorance of the actual state of compliance with Title IX by his athletic program").

*Gebser's* deliberate indifference test). If, as the Court of Appeals correctly held in this case, Petitioners could not meet the more lenient test of deliberate indifference, they certainly could not meet the more rigorous discriminatory animus standard they now apparently advocate. Indeed, during the briefing on appeal, Petitioners did not seriously challenge the applicability of the *Gebser* standard. Rather, they argued repeatedly in their briefs to the Court of Appeals that they had met *Gebser's* notice and deliberate indifference test. *See* Petitioners' Brief on Appeal at 32-35, 44-47 and Reply Brief at 8-18 (arguing that evidence satisfies *Gebser*).[15] The District Court and the Court of Appeals disagreed.

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15. To support this assertion, Petitioners cited to the same documents they rely upon in the Petition. These documents — including inadmissible newspaper articles and documents written years, and in some cases decades, before Petitioners were students at UMD — are not relevant to the question of whether they themselves were subject to intentional discrimination. Moreover, a review of the actual text of the documents, as opposed to Petitioners' characterization of them, does not show that UMD deliberately discriminated against female athletes or that UMD admitted it was violating Title IX. Petitioners also rely upon an affidavit from the former track and field coach at UMD, Eleanor Rynda, in arguing that there is at least a question of fact as to whether they met the *Gebser* standard. Pet. at 7-8. This affidavit does not create a question of fact. Eleanor Rynda was the coach of the track and field teams (men's and women's) at UMD. Petitioners are not alleging discrimination as a result of being on the track and field team. Indeed, the one Petitioner who was on the track team, confirmed that there was nothing about her experience on this team that lead her to conclude that she was discriminated against. *See* Lindal Deposition at 72-74, Resp. CAP App. at 57-58; *see also* Memorandum and Order, Pet. App. 25 n.3.

Moreover, the District Court held, as an alternative to its *Gebser* holding, that Petitioner Grandson did not meet the higher standard of discriminatory animus. The District Court held:

> Even if *Gebser* were limited to sexual harassment cases, though, Grandson's claim would still fail. She apparently relies solely on the fact that the women's soccer team receives less university funding than some men's varsity teams to support her charge. However, nothing in either Title IX or the regulations associated with the statute mandates that a university spend equal amounts of money on male and female athletic teams. 34 C.F.R. § 106.41(c) makes this quite explicit, stating "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute non-compliance with this section." As a result, a funding disparity between men's and women's teams by itself is insufficient to support an unequal treatment claim. Grandson has not coupled this allegation about disparate funding with any other evidence which would support an unequal treatment claim, such as proof of intentional discrimination or deliberate disregard for women's athletics. As a result, her unequal treatment claim would fail on this ground as well.

*See* Memorandum and Order, Pet. App. at 29-30.[16] The Court of Appeals did not disturb this finding. Petitioners are thus

16. This finding was made for Petitioner Grandson but it is equally applicable to the *Thompson* Petitioners since they relied upon the same evidence as Grandson in opposing summary judgment.

incorrect to argue that they "would have been allowed to proceed to trial" under the measure used in *Pederson*. Pet. at 27.[17]

Since Petitioners do not meet either the deliberate indifference test or the discriminatory animus test, this case presents no occasion for the Court to render anything other than an advisory opinion on the split Petitioners say exists. Accordingly, the Petition should be denied.

## CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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17. The evidence in *Pederson* showed intentional discrimination even under the stricter discriminatory animus test. For example, the athletic director in *Pederson*, when meeting with one of the Plaintiffs to discuss her concerns over equal treatment, referred to her "repeatedly as 'honey,' 'sweetie' and 'cutie' and negotiated with her by stating that 'I'd love to help a cute little girl like you' " The director "also opined that soccer, a 'more feminine sport,' deserved consideration for varsity status because female soccer players 'would look cute running around in soccer shorts.' " 213 F.3d at 881. As the District Court and Court of Appeals recognized, there is no evidence indicating that Petitioners in this case were subject to such behavior.

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No. 01-1261

In The

# Supreme Court of the United States

JULIE GRANDSON, ET AL.,

*Petitioners,*

v.

UNIVERSITY OF MINNESOTA, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

Petitioners Julie Grandson, Jennifer A. Thompson, Renata D. Lindahl, Ginger M. Jeffries, Alexandra L. Wongstrom and Paula Olson file this reply in order to correct misstatements of law and facts contained in Respondents' Brief in Opposition ("Opposition").

### I. Petitioners Have Stated a Claim Against the University of Minnesota, Duluth For Intentional Discrimination Under Title IX

Quoting language from the lower court decisions, Respondents argue that Petitioners have failed to state a case against Respondent University of Minnesota, Duluth ("UMD"), for intentional discrimination against female student athletes in UMD's funding and operation of its intercollegiate athletic program. Opposition, p. 2 n. 3. That the lower courts found no intentional discrimination in the face of UMD's 20-year history of acknowledged non-compliance with Title IX serves to emphasize those courts' confusion over the proper standard for establishing intentional discrimination in the funding and operation of an intercollegiate athletic program – confusion which this Court now has an opportunity to resolve.

As set out on pages 4-15 of the Petition for a Writ of Certiorari, the summary judgment evidence establishes that UMD was well aware since at least the late 1970's that its athletic program failed to comply with Title IX, but failed to take any real steps to remedy that violation until *after* these lawsuits were filed, *after* the Office for Civil Rights ("OCR") had intervened,[1] and *after* the Office

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[1] Respondents suggest that UMD's settlement with OCR mooted Petitioners' claims. This Court rejected the same argument more than 20 years ago in *Cannon v. University of*

of Legislative Auditor of the State of Minnesota ("OLR") had begun an investigation that concluded that UMD had misused funds specifically appropriated by the Minnesota Legislature since 1979 to bring UMD's athletic program into compliance with Title IX.[2] The summary judgment evidence establishes that when these three events occurred in 1996/97, the highest officials at UMD had been aware for over 20 years that its athletic program discriminated against female athletes in violation of Title IX. Actual notice of UMD's violation of Title IX came

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*Chicago*, 441 U.S. 677 (1979) when it held that a private cause of action existed under Title IX regardless of whether an administrative proceeding had been instituted. This ruling is particularly applicable in cases like this one in which monetary damages are sought. OCR has no authority to award monetary damages or to in any way make Petitioners whole. The OCR's investigation and settlement with UMD confirms that UMD did indeed discriminate against its female student athletes in violation of Title IX during the time period relevant to this case.

[2] In footnote 3 of their Response, Respondents challenge Petitioners' statement, based on the OLR audit report, that UMD had "misused" legislatively appropriated funds. The audit report expressly concluded "we found no evidence that the University central administration ensured that UMD complied with the specific legal restrictions on the funding [that it be used for women's athletics]." CAP App. 268. The audit report also concluded that UMD's offer to return $68,663 of the misused funds was insufficient because "we have questioned additional cost allocation and budget practices of the UMD Athletics." CAP App. 287. OLR recommended that "the State Department of Finance should attempt to negotiate a resolution with the University about the questioned spending by UMD from the state special appropriation." CAP App. 289. The OLR audit was launched only after repeated complaints dating back to 1979 that UMD was misusing the special allocation for women's athletics to subsidize men's athletics. CAP App. 164, 191-94, 249-53, 304.

from students, women's groups and UMD's own employees. CAP App. 164-65, 167-68, 169, 185, 186, 195, 221, 232-35, 241. UMD's own officials repeatedly acknowledged that UMD's intercollegiate athletic program violated Title IX. CAP App. 164, 165, 196-207. Yet, UMD took no real steps to end gender discrimination in its athletic program until after it was forced to do so by these lawsuits, OCR's investigations and OLR's audit. Based on circumstances much less egregious than these, the Fifth Circuit held that Louisiana State University ("LSU") had intentionally violated Title IX by discriminating against female student athletes and was therefore subject to monetary damages. *Pederson v. Louisiana State University*, 213 F.3d 858, 880-81 (5th Cir. 2000). At the very least, the evidence in this case creates a fact issue regarding whether UMD intentionally discriminated against female student athletes. It certainly does not support the lower courts' conclusion, based on the misapplication of the standard announced for sexual harassment cases in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998), that Petitioners failed to establish intentional discrimination as a matter of law.

## II. Actions UMD May Have Taken to End Discrimination After These Suits Were Filed Is Not Relevant to Petitioners' Claims for Monetary Damages

UMD argues that it is now in compliance with Title IX, citing facts and figures from 1998-2001. Opposition, pp. 3-5. Even if true, UMD's assertion is irrelevant to Petitioners' claims for money damages. UMD's belated attempt to bring its athletic program into compliance with Title IX only after it was forced to do so by these lawsuits, the OCR's investigation, and the OLR's audit, came too late to benefit Petitioners and similarly situated

female athletes, all of which UMD concedes either graduated or otherwise became ineligible to participate in intercollegiate athletics by 1998.[3] Opposition, p. 6. Nor do any steps UMD may have taken to end gender discrimination only after it was forced to do so have any bearing on whether UMD intentionally discriminated against female athletes during the time period at issue. In *Pederson v. Louisiana State University*, the district court found that LSU had not complied with Title IX even though it had added two new women's teams during the period at issue, because LSU had not added those teams in response to increasing interests and abilities of its women students, but because the Southeastern Conference had required it to. "This Court finds that historically LSU has demonstrated a practice *not* to expand women's athletics at the university before it becomes absolutely necessary to do so." 912 F. Supp. 892, 916 (M.D. La. 1996), *aff'd in relevant part*, 213 F.3d 858 (5th Cir. 2000) (emphasis in original).

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[3] UMD argues that this Court does not have jurisdiction over the claims of Paula Olson and Alexandra Wongstrom, who Petitioners sought to add as plaintiffs in their amended complaint, because Petitioners did not object to that portion of the Magistrate Judge's order denying Petitioners' motion to amend to add Olson and Wongstrom. Opposition, p. 7 n. 11. UMD's argument is wrong for the simple reason that the Magistrate Judge did not address the joinder of Olson and Wongstrom as a separate issue, but expressly denied joinder for the same reasons he denied Petitioners' motion for leave to file an amended complaint, to all of which, Petitioners filed objections with the district court. UMD's waiver argument, therefore, has no merit. *Orthopedic Sports Injury Clinic v. Wang*, 922 F.2d 220, 225 (5th Cir. 1991) (party has no obligation to object to point not expressly addressed in Magistrate's report).

## III. UMD's Entire 20-Year History of Knowing Violation of Title IX Should Be Considered

UMD attempts to shield from examination the first half of its 20-year effort to knowingly evade the requirements of Title IX by ignoring everything that happened before 1988. Opposition, pp. 3-5. UMD argues that its choice of 1988 as a benchmark year for Title IX compliance purposes is proper because that is the year Congress passed the Restoration Act overturning this Court's decision limiting the scope of Title IX. UMD Brief at 4 n. 2. This argument is without merit. The OCR has specifically stated that Title IX compliance is determined based on "the entire history of the athletic program." OCR Clarification of Intercollegiate Athletics Policy Guidance (1996), p. 5. Every court that has addressed an athletic program's compliance with Title IX has examined the history of the program from the enactment of Title IX. *See Cohen v. Brown Univ.*, 991 F.2d 888, 892 (1st Cir. 1993) (examining Brown's women's athletic program back to 1977); *Pederson v. Louisiana State Univ.*, 912 F.Supp. at 901 (examining female participation opportunities at LSU starting in 1977); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 830 (10th Cir. 1993) (finding that Colorado State University could not demonstrate a history and program of expansion of women's athletics because the number of participation opportunities had decreased by 35% since 1977).

## IV. A Clear Split in the Circuits Exists Regarding the Standard for Establishing Intentional Discrimination in the Funding and Operation of an Intercollegiate Athletics Program

UMD argues that no split in the circuits exists in determining when monetary damages can be awarded for

failure to comply with Title IX in the funding and operation of an intercollegiate athletics program because all circuits that have considered the issue agree that a showing of intentional discrimination is required. Opposition, pp. 7-10. UMD's argument begs the obvious question: What must a Title IX plaintiff show to establish intentional discrimination? In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court held that money damages are available under Title IX if a showing of intentional discrimination is made. In *Gebser v. Lago Vista Ind. Sch. Dist.*, this Court resolved a split in the circuits over the showing necessary to establish intentional discrimination in a sexual harassment case by holding that a plaintiff must establish that she provided actual notice of the harassment to the educational institution and that the institute responded with conscious indifference. In *Pederson v. Louisiana State University*, 213 F.3d 881-82, the Fifth Circuit expressly rejected the *Gebser* standard for establishing intentional discrimination in a Title IX case involving the funding and operation of an intercollegiate athletic program. The Fifth Circuit held that LSU's long history of unequal treatment of female athletes constituted intentional discrimination even though it was based on outdated female stereotypes rather than on any discriminatory animus. *Id.* at 880-81 ("Appellees need not have intended to violate Title IX, but need only have intended to treat women differently").

In *Horner v. Kentucky High School Athletic Ass'n*, 205 F.3d 685 (6th Cir.), *cert. denied*, 531 U.S. 824 (2000), the Sixth Circuit followed the Fifth Circuit in rejecting the *Gebser* standard for identifying intentional discrimination in Title IX athletics cases, but in dicta adopted a discriminatory animus test contrary to the standard applied in *Pederson*. 205 F.3d at 692-93.

In this case, the Eighth Circuit ignored the holdings in both *Pederson* and *Horner* and applied the *Gebser* standard without analysis. Petitioners' App. at 11. Because the Eighth Circuit determined that each of the Petitioners had not individually provided actual notice to UMD of UMD's discrimination against that specific Petitioner, it concluded that under *Gebser*, Petitioners had failed to state a claim as a matter of law.[4] The split between the Fifth, Sixth and Eighth Circuits over the showing necessary to establish intentional discrimination in a Title IX intercollegiate athletics case is *exactly* the same type of lower court split the Court granted certiorari in *Gebser* to resolve. The Court should do the same in this case.[5]

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[4] In a class action, the Eighth Circuit's holding would require a showing that each class member had individually complained to the defendant institution about discrimination in the funding and operation of intercollegiate athletics. Such a result is clearly unworkable and has been rejected by the Court under analogous circumstances. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (every member of plaintiff class need not have filed a prior individual claim with EEOC in order to state a claim for gender discrimination under Title VII).

[5] Respondents argue that in their briefing on appeal, Petitioners did not seriously challenge the applicability of the *Gebser* standard. Opposition at 11. Petitioners did not cite either the *Pederson* or *Horner* appellate court decisions in its initial brief to the Eighth Circuit, because that briefing was completed in July 1999, before either decision had been issued. In a letter submitted pursuant to Fed. R. App. P. 28(j), Petitioners brought the *Pederson* decision to the Eighth Circuit's attention and contended at oral argument that the court should determine whether UMD's conduct constituted intentional discrimination using the *Pederson* standard rather than the *Gebser* standard.

## V. The Fifth Circuit Did Not Adopt and Petitioners Do Not Advocate a Discriminatory Animus Test

UMD asserts, incorrectly, that the Fifth Circuit in *Pederson* adopted a "discriminatory animus" test that is more rigorous than the standard adopted in *Gebser*. Opposition, p. 9. UMD then argues that if Petitioners could not meet the more lenient *Gebser* test, they could also not meet the discriminatory animus test. *Id.*, pp. 10-13. UMD's argument fails because the Fifth Circuit expressly *refused* to adopt a discriminatory animus test in *Pederson*.

The district court in *Pederson* had ruled that LSU's history of unequal treatment of female athletes was "not a result of intentional discrimination, but a matter of 'arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the by-product of resistance to change'." 213 F.3d at 880. The Fifth Circuit forcefully rejected the notion that LSU's conduct did not constitute intentional discrimination because LSU did not understand that it was illegal:

> It bears noting that the provisions of Title IX and its attendant regulations are not merely hortatory; they exist, as does any law, to sculpt the relevant playing field. Consequently, Appellees' alleged ignorance of the law does not preclude our finding that LSU acted intentionally. Appellees need not have intended to violate Title IX, but need only have intended to treat women differently.

*Id.* at 880-81.

LSU argued that under the *Gebser* standard, "before a finding of intentional discrimination is warranted, [LSU] must have been aware that [it was] discriminating on the

basis of sex by not effectively accommodating the interests and abilities of its female student athletes. *Id.* at 882. The Fifth Circuit ruled that the *Gebser* standard was designed to determine whether educational institutions are aware of sexual harassment carried out by their employees and had no application to claims that a university had discriminated in the operation of its intercollegiate athletics program:

> In the instant case, it is the institution itself that is discriminating. The proper test is not whether it knew of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity, and, as we noted above, we are convinced that they did. Our review of the record convinces us that an intent to discriminate, albeit one motivated by chauvinist notions *as opposed to one fueled by enmity*, drove LSU's decisions regarding athletic opportunities, for its female students.

*Id.* (emphasis added). There is no basis for Respondents' assertion that the Fifth Circuit adopted a discriminatory animus standard.[6]

There is also no basis for Respondents' assertion that Petitioners cannot meet the standard applied by the Fifth Circuit. The evidence of UMD's 20-year history of

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[6] Two of the judges on the Sixth Circuit panel in *Horner v. Kentucky High School Athletic Ass'n* did, in dicta, suggest a discriminatory animus test for determining intentional discrimination in Title IX athletics cases. 206 F.3d at 696. The dissent rejected that standard as too strict. *Id.* at 698-706. Contrary to Respondents' suggestion, Petitioners do not advocate the adoption by this Court of a discriminatory animus test.

egregiously unequal treatment of male and female athletes is far more detailed and extensive than the evidence on which the Fifth Circuit based its holding:

> LSU appointed a low-level male athletics department staff member to the position of "Senior Women's Athletic Administrator," which the NCAA defines as the most senior women in an athletic department. LSU consistently approved larger budgets for travel, personnel, and training facilities for men's teams versus women's teams. The university consistently compensated coaches of women's teams at a rate far below that of its male team coaches.

*Id.* at 881. Under the Fifth Circuit's holding, Petitioners would have been allowed to proceed to trial.

Respectfully submitted,

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